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No. 10-865

Supreme Court, U.S.
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In The

Supreme Court of the United States

SCOTT WYNNE,

Petitioner,

v.

PAUL RENICO, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

There is a profound split of authority in the federal circuits and state appellate courts whether the standard for admission of other acts evidence is the same for a non-party as for a criminal defendant, when evidence of the other acts of a non-party essential to a defense of third party culpability is offered by the accused. The majority view is that when a criminal defendant offers evidence of the other acts of a non-party to establish a defense, concerns of prejudice are inapplicable, because one who is not on trial cannot suffer prejudice. The minority view, which the Sixth Circuit found compelled the reversal of the district court's grant of a writ, is that the policies which underlie the other acts rule, including prejudice to the actor, are applicable to non-parties as well as defendants.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court has held that a criminal defendant has a constitutional right to present a complete defense. The questions presented are:

1. Should this Court grant certiorari to resolve a split in the lower courts regarding the standard for admission of evidence of other acts by persons other than the accused?

2. Was Petitioner denied his Fifth, Sixth, and Fourteenth Amendment rights to present a complete defense where the trial court excluded relevant defense evidence that he was framed by the key prosecution witness who may have committed the murder and had motive to lie based upon the arbitrary application of a state evidentiary rule?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Wynne prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which reversed the district court grant of his petition for writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the grant of the petition for writ of habeas corpus, is reported at 606 F.3d 867 (6th Cir. 2010), and is reprinted in the Appendix at pages App. 1-17. The January 23, 2009, district court's Supplement to Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus is reported at, 595 F. Supp. 2d 775 (E.D. Mich. 2009) and is reprinted in the Appendix at pages App. 18-43. The September 7, 2003, district court Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus is reported at 279 F. Supp. 2d 866 (E.D. Mich. 2003) and is reprinted in the Appendix at pages App. 44-107. The unpublished opinion of the Michigan Court of Appeals affirming Petitioner's conviction, *People v. Scott Wynne* (Docket No. 192512), is reprinted in the Appendix at App. 108-120. The Order of the Michigan Supreme Court denying leave to appeal from the decision of the Court of Appeals is reported, *People v. Scott Wynne*, 463 Mich 876, 618 N.W.2d 595 (2000), and is reprinted in

the Appendix at App. 121. The August 3, 2010, order of the Sixth Circuit denying rehearing is reprinted in the Appendix at App. 122.

JURISDICTION

The Sixth Circuit Court of Appeals reversed the district court's grant of the petition for writ of habeas corpus on June 4, 2010, and denied Petitioner's timely motion for rehearing and suggestion for rehearing *en banc* on August 3, 2010. On October 14, 2010, this Court granted Petitioner's motion to extend the time for filing a petition for writ of certiorari to December 31, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which in pertinent part reads as follows:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

It also involves the Sixth Amendment to the Constitution of the United States, which in pertinent part provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

It also involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

Introduction

This case presents a recurring issue regarding the confluence of the constitutional right to present a defense of third party culpability with a split of authority in federal and state courts on the standard for admission of evidence of the "other acts" of non-parties.

A criminal defendant has the constitutional right to present a complete defense, including a claim of third party culpability. *Chambers v. Mississippi,* 410 U.S. 284 (1973). In *Chambers*, this Court held that where constitutional rights affecting the ascertainment of guilt are implicated, evidence rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. Restrictions on a criminal defendant's right to present relevant evidence may

not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). In evaluating the probative value of defense evidence, the defense is not held to the same standard as the prosecution in determining whether the evidence is sufficiently probative to be admitted. *Washington v. Texas*, 388 U.S. 14 (1967). While this Court addressed the right to present a defense of third party culpability in *Holmes v. South Carolina*, 547 U.S. 319 (2006), this case presents a different issue not governed by that decision and on which the lower courts need guidance.

There is a profound split of authority on the question whether the standard for admission of other acts evidence is the same for a non-party as for a criminal defendant, when evidence of the other acts of a non-party essential to a defense is offered by the accused. The majority view is that when a criminal defendant offers evidence of the other acts of a non-party to establish a defense such as third party guilt, concerns of prejudice are inapplicable, because one who is not on trial cannot suffer prejudice, i.e., be convicted. The minority view, which the Sixth Circuit found compelled the reversal of the district court's grant of a writ of habeas corpus in this case, is that the policies which underlie the other acts rule are applicable to non-parties as well as defendants.

This Court should grant certiorari to resolve this continuing split in the case law. *Cf.* the Sixth Circuit decision in this case with a state supreme court decision to the contrary rendered just two months later, *State v. Hedge*, 297 Conn. 621, 1 A.3d 1051 (CT, 2010).

Procedural History

Petitioner Scott Wynne was convicted of first degree murder, MCL 750.316, MSA 28.548, and possession of a firearm in the commission of a felony, MCL 750.227B, MSA 28.424(2), after a three week jury trial in Allegan County, Michigan in 1995. On January 5, 1996, he was sentenced to life in prison without parole for murder plus two years consecutive for felony firearm.

Petitioner filed a timely Claim of Appeal and a timely Motion for New Trial. After holding lengthy evidentiary hearings and receiving about 300 exhibits, the trial court denied the Motion on July 20, 1998, and denied reconsideration on August 13, 1998.

The Michigan Court of Appeals affirmed in an unpublished opinion issued December 3, 1999, and denied rehearing on February 3, 2000. *People v. Wynne*, MCOA Docket No. 192512. The Michigan Supreme Court denied leave to appeal in a standard one sentence order issued September 26, 2000. *People v. Wynne*, 463 Mich 876, 618 N.W.2d 595 (2000).

Petitioner filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The District Court granted a writ in a reported Opinion and Order issued September 2, 2003.

The state appealed to the Sixth Circuit and pointed out factual issues on which the district court erred. The parties agreed to remand the case to the district court for reconsideration, and the Sixth Circuit did so on March 15, 2004. On January 23, 2009,

the district court issued a Supplement to its original Opinion, and, after careful review, the district court again ruled that Wynne's Sixth Amendment rights had been violated and granted the writ. The state appealed, and the Sixth Circuit reversed in a reported opinion issued June 4, 2010, and denied rehearing in an order issued August 3, 2010.

Statement of Facts

The case arose out of the shooting death of Phillip Timmerman, who was shot multiple times with a .45 and once with a .22 at close range while working on his farm at 10:35 p.m. on May 18, 1995. There were no eyewitnesses.

The prosecution theory was that Wynne killed Timmerman, because he was angry that Timmerman was unwilling to renegotiate a long term lease on land leased from Petitioner's mother. The most important physical evidence was the fatal weapon, a .45 pistol belonging to Wynne, found hidden above ceiling tiles in Petitioner's bedroom. One fingerprint on the .45 belonged to a police officer, and there was a second unidentified print which did not belong to Wynne. All of Wynne's guns were accounted for, but the .22 which shot Timmerman was never recovered. The state theorized that Wynne traveled a 2.7 mile, or longer, route from his home on foot over farmland at night, laid in wait, shot Timmerman, and returned home in a short period of time. A problem with that theory was time and distance – the defense presented testimony that Wynne was alone for less than a half hour between 10:00 p.m. and 10:30 p.m.

Police used tracking dogs and found the killer's footprints leading to and from the scene. There was an area of matted grass, where it appeared the killer had lain in wait. The killer's footprint trail was in the opposite direction from Wynne's home. All Wynne's shoes were seized by police, but they were a different size and did not match the footprints at the scene.

Wynne's theory was that he was framed, and that he was at home at the time of the murder. He sought to offer evidence which suggested that the state's key witness, Mark Peckham, took the pistol without him being aware of it, killed Timmerman, and hid the pistol back at Wynne's home the next day when no one was home. The theory was that Peckham framed Wynne for revenge for perceived wrongs done by Wynne, both real and imagined -- Wynne fired him, refused to sell him a house, refused to sell him a mower, and Peckham believed Wynne had Peckham's telephone disconnected.

After a hearing outside the jury's presence, the trial court excluded the evidence supporting the third party culpability defense. Consequently, defense counsel did not argue to the jury that Peckham framed him. The defense evidence admitted at trial was limited to alibi and testimony regarding Peckham's credibility. The exclusion of evidence pointing at Peckham, which prevented presentation of the defense of third party culpability, prejudiced Wynne.

Some evidence pointed to a different perpetrator. A neighbor saw a man, not Wynne, come out of some

thick brush from the direction of the scene and head away quickly down the road as police were arriving. During Wynne's interrogation, a detective told him that police were unable to find his .45 and had given up looking, and Wynne insisted that they continue to search, because it had to be at his home, unlikely conduct for one who knew the pistol was hidden in an obvious place.

During trial, someone apparently planted a duffle bag in the Wynne home containing several items, including the boots worn by the killer. Wynne was in custody awaiting trial. The defense theory was that the bag was planted by Peckham, but the evidence supporting that conclusion was excluded. After court one day, Petitioner's mother and sister returned home and found the front door open. They had had recent problems with prowlers, so they called defense counsel, who sent investigators to check the house. The investigators found a blue duffel bag under a bed in a spare room. The bag had not been there when the house was previously searched, twice by police and also by the defense. The boots, some camouflage clothing, and other items were in the bag. Outside the jury's presence, defense counsel said a piece of petite women's lingerie, a black camisole, was found with the bag, which defense counsel argued connected the bag to Peckham, because he had a lingerie fetish. The contents of the bag were introduced in evidence, but not the camisole.[1]

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[1] The opinion criticizes the defense for not mentioning "until several days after delivering the bag to the court that it found

(Continued on following page)

Counsel turned over the bag and contents to the court the morning after its discovery. Peckham testified later that day. The testimony of a state police expert that the boots in the bag matched the killer's footprints at the murder scene was not until a week later. At trial, Peckham admitted he had borrowed camouflage clothing from Petitioner to play paintball the Sunday before the murder, but maintained he returned it the same day.

Wynne testified the boots were not his – they were size nine and a half and he wears size ten and a half sneakers and size eleven work boots.

Peckham's actions and knowledge also warranted admission of the evidence pointing at him. Peckham had lived at Petitioner's home for a while as a teen and knew how to get in without a key. Peckham also knew where Wynne kept a spare house key hidden, and knew the code to enter Wynne's shop building. He was familiar with Petitioner's guns and knew he kept his .45 on his bedpost. A neighbor saw Peckham at Wynne's residence two days before the murder, and the shop door was open, but no one else was there. Peckham said if he were to have committed the

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a black camisole near the bag." 606 F.3d at 869. This criticism is misplaced, because it ignores the reason for the delay.

The bag was found on a Monday evening and turned over to the court on Tuesday morning. The camisole was not mentioned by counsel until the following Monday, because Melissa Hill, Peckham's ex-girlfriend, did not advise defense counsel until Friday that Peckham had a lingerie fetish, four days after the bag was found. Until then, the defense did not realize the significance of the lingerie found with the bag.

murder himself, he would have worn camouflage clothing and laid in wait.

Peckham admitted he had borrowed camouflage clothing from Petitioner to play paintball the Sunday before the murder, but maintained he returned it the same day. He admitted in a police interview that he had also borrowed a pair of brown boots from Petitioner. The bag containing the killer's boots, camouflage clothes, and other items including a tear gas canister and a mirror, appeared mysteriously at Petitioner's home on the first day of trial. The soil on the boots was dissimilar to a soil sample from the scene, which suggested the boots had been worn elsewhere after the murder. A teargas canister in the bag had Petitioner's fingerprint on it, but Wynne testified he had given it to Peckham a week before the murder. There were other unidentified fingerprints on items in the bag.

At the hearing on Petitioner's motion for new trial, defense investigators said that during their investigation when Peckham accompanied them to the scene he seemed nervous. He admitted he had been there before, was familiar with the area where the grass was matted down, and pointed out a vantage point where one could survey the barn near where Timmerman was shot. He described how he thought the murder had occurred, and one investigator thought he was providing details he should not have known at the time. He said he had fired Wynne's .45, but volunteered that he had never rapid fired it, which was how Timmerman was shot.

The case against Petitioner was circumstantial. So was the defense theory of third party culpability. The excluded evidence implicating Peckham, while circumstantial, was strong and reliable and warranted admission, as the district court found:

> Although the circumstances do not render impossible the prosecution's theory, there is certainly room to doubt the state's theory and consider an alternative that would involve a different killer. App. 83.

The Sixth Circuit opinion rests upon a significant mistake of fact. The opinion states that "[a]s part of his defense, Wynne alleged that Peckham had killed Timmerman," the trial court allowed Wynne to introduce evidence that "Peckham wanted to frame him," and "the state trial court . . . permitted Wynne to introduce considerable evidence that Peckham was the murderer. . . ." 606 F.3d at 869; 871. In fact, there was no evidence admitted that Peckham wanted to frame him, nor any evidence which inferred that Peckham was the murderer. The trial court only admitted evidence which challenged Peckham's credibility and suggested he bore animosity toward Wynne, but excluded the evidence pointing at Peckham and his motive to lie. Contrary to the Sixth Circuit opinion, defense counsel did not argue to the jury that Peckham committed the crime and framed Wynne, because the evidence which suggested that conclusion was excluded.

Matthew Radke had been a good friend of Peckham since high school until 1992, but was no longer a

friend due to Peckham's "mental deterioration." The prosecutor objected, and Radke's testimony before the jury was limited to his opinion that Peckham was untrustworthy.

Outside the jury's presence, Petitioner made an offer of proof. T Vol. IX, 281-290. Radke testified that Peckham had vandalized his own truck with a crowbar and initially blamed someone else, but later admitted to Radke he did it himself. Radke said Peckham talked about avoiding the debts caused by his vandalism of his own truck and the arson of his own trailer by going into bankruptcy. Peckham admitted to Radke he had lost control and beat his girlfriend, and asked Radke whether he thought the two of them could "take" his stepfather, against whom he had a grudge. Prior to vandalizing his own truck, Peckham attempted suicide, and when Radke visited him in the hospital he made no sense and declined mentally after that. Peckham characterized himself to Radke as "passive-aggressive" with a penchant for violence and getting revenge in secretive ways, and Radke said Peckham was preoccupied with violence and seemed capable of it. These incidents occurred when he and Peckham were 20 and 21, five to six years before trial.

The testimony of Melissa Weeks Hill, Peckham's former girlfriend, was also limited to her opinion that Peckham was not truthful. Petitioner also made an offer of proof outside the jury's presence regarding her testimony. T IX, 296-301. She dated Peckham for about five years and lived with him for a year. He

was violent to her. He vandalized his own truck, but told police her new boyfriend had done it, and later admitted to her that he had done it for the insurance. He had showed her what he said was an unregistered handgun, and said he would kill her and himself if she told his family he had it. She said sometimes he would drive at high speed and ask her how she felt about dying, and then would stop the car and smile.

Hill said that Peckham also threatened to kill her if she ever told that he stole women's underwear. She said he used a key obtained from his brother, an apartment manager, to break into female tenants' apartments and steal their underwear. He stole underwear from Hill's girlfriends and even asked her to do it for him. He kept a large collection of stolen underwear with a list of the names and addresses of the women from whom it was stolen and of those whose underwear he wanted but had not stolen yet. Peckham had the fetish since he was young and would sleep with the underwear or hold it to comfort himself. Peckham had a pair of Hill's underwear with him on the night of his suicide attempt, threw it away before he shot himself, and, after his release from a psychiatric hospital, he went looking for it. Hill also said his trailer, where she had lived with him, burned within twenty four hours of her breaking up with him with her possessions in it.

Defense counsel argued, outside the jury's presence, that Peckham's penchant for stealing women's lingerie – in addition to his readiness to go into people's homes when they were away – was relevant,

because the petite black camisole, which did not belong to the Wynnes, was found on top of the blue duffle bag with the killer's boots. T IX, 304-305. Because all this evidence was excluded, defense counsel did not argue to the jury that Peckham committed the murder. Only outside the jury's presence, while arguing for admission of the evidence, did defense counsel allege that the excluded evidence pointed at Peckham and the camisole was his signature.

The admitted evidence regarding Peckham went only to credibility, and did not point to Peckham as a third party perpetrator. In opening statement, defense counsel only said that Wynne could not have committed the crime, given the times and distances involved, and that he had no motive. Defense counsel did not argue in closing that Peckham was culpable and framed Petitioner but only challenged Peckham's credibility. The trial court's exclusion of the evidence which inferentially supported the theory of Peckham's guilt precluded the defense from arguing Peckham's culpability.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHERE THE TRIAL COURT EXCLUDED DEFENSE EVIDENCE THAT HE WAS FRAMED BY THE KEY PROSECUTION WITNESS WHO MAY HAVE COMMITTED THE MURDER AND HAD MOTIVE TO LIE.

A. The Sixth Circuit Decision is in Conflict With Clearly Established Supreme Court Precedent.

The right to present a defense of third party culpability is clearly established. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006). State evidentiary rulings may impede the discovery of truth and thus preclude the "meaningful opportunity to present a complete defense" guaranteed by the Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986). Restrictions on the defendant's right to present relevant evidence may not be arbitrary or disproportionate to their purposes. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

A decision to exclude material defense evidence poses a fundamental constitutional question, and the rules of evidence are not dispositive. A court's discretion in evidentiary rulings is circumscribed by the rules of evidence ***and*** the defendant's constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. at 294. In evaluating the probative value of defense evidence, the defense is not held to the same

standard as the prosecution in determining whether the evidence is sufficiently probative to be admitted, *Washington v. Texas*, 388 U.S. 14 (1967), because a defendant need only raise a reasonable doubt. The threshold for admissibility is whether the evidence could create a reasonable doubt in the mind of a qualified juror.

The Sixth Circuit opinion conflicts with prior decisions of this Court. The opinion states "[t]he Sixth Amendment right to present 'a complete defense' . . . does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." 606 F.3d 871.

That holding squarely conflicts with a long line of decisions of this Court holding that evidence inadmissible under state evidence rules may be admissible based upon the constitutional right to present a defense. That line of cases includes *Chambers v. Mississippi*, *supra*; *Holmes v. South Carolina*, *supra*; *Olden v. Kentucky*; 488 U.S. 227 (1988); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Delaware v. VanArsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); and *Washington v. Texas*, 388 U.S. 14 (1967). In all these cases, state courts correctly applied state rules of evidence in approving the exclusion of defense evidence, but this Court nonetheless reversed on constitutional grounds.

In *Lilly v. Virginia*, 527 U.S. 116 (1999), this Court recognized that the standard for admission of evidence offered by the defense is often different than for

evidence offered by the state, because constitutional protections extend to the accused, not the state. In *Lilly*, this Court said that hearsay statements inculpatory to the declarant but exculpatory to the defendant and "offered by the accused . . . [do] not implicate Confrontation Clause concerns; rather, their exclusion threatened Due Process protections. This was the message of *Chambers v. Mississippi*, 410 U.S. 284 (1973), which held that the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against (their own) penal interest when the statements were made under circumstances that 'provided considerable assurance of their reliability.' Id. at 300." The Sixth Circuit decision here flatly conflicts with *Lilly*, *Chambers*, and *Washington*, in that in criminal proceedings the application of the rules of evidence varies depending on which party seeks to introduce the evidence.

If the right to present a defense meant no more than a fair application of the rules of evidence, as the Sixth Circuit said here, it would be trivial. Where the application of state evidence rules leads to the exclusion of relevant evidence, the constitutional question is not simply whether the evidence rule is arbitrary, but whether the rule is ***applied*** in a way which excludes relevant evidence, as happened here. The Sixth Circuit's starting point is irreconcilable with this Court's precedent.

B. There is a Circuit Split on the Issue Upon Which the Sixth Circuit Decision Was Based, Whether the Standard for Admission of Other Acts Evidence of a Witness is the Same as for a Defendant.

The Sixth Circuit found the state court properly excluded the defense evidence based upon a state evidentiary rule, MRE 404(b), virtually identical to FRE 404(b), and the rule permissibly limited Wynne's right to introduce evidence about Peckham. The Court characterized Petitioner's constitutional claim as "whether the state court's construction of their evidentiary rule – a matter for them, not for us, to decide – violates the Sixth Amendment right to present a complete defense." 606 F.3d at 870. The Court went on to say "[u]nfortunately for Wynne, we already have resolved the point" in *United States v. Lucas*, 357 F.3d 599 (6th Cir. 2004). *Id.* The opinion depends entirely on the court's view that it was bound by its own precedent.

Lucas is in the minority on an issue on which there is a pronounced circuit split, whether the standard for admission of other acts evidence of a non-party witness is the same when evidence essential to a defense is offered by the accused rather than the state. In a reluctant concurrence, Judge Martin said *Lucas* was wrongly decided but was controlling:

> I concur in the reasoning and conclusion of the lead opinion, but do so with reservations because the analysis and conclusion are based

> on a faulty precedential foundation. The majority has found that the district court erred in granting Scott Wynne habeas relief on the ground that the state court denied Wynne his constitutional right to present a defense. The state court refused under state evidentiary rule 404(b) to admit evidence that Wynne proffered to show that a third party committed the murder and framed Wynne for its commission . . . [I]n *United States v. Lucas*, 357 F.3d 599, 606 (6th Cir.2004) we held that the identical 404(b) analysis engaged in by the Michigan state court also applies in this Court "generally . . . in cases where such evidence is used with respect to an absent third party not charged with any crime." Because it makes no sense to contend that it violates the Constitution for a state court to apply an evidentiary rule in a certain way but that a federal court can, I cannot dissent from the majority's opinion. Thus, I must concur, but I do not like the result we reach. (Footnotes omitted.) 606 F.3d at 872.

The state court refused under MRE 404(b) to admit evidence Wynne sought to introduce to show that the key witness committed the murder and framed Wynne. When the defense in a criminal case seeks to introduce evidence to show another person may have committed the crime, the purpose is not to prove third party guilt, but to raise a plausible claim that the accused did not commit the offense. In this case, the prosecution was based upon the implausibility that anyone other than the accused did it, given the circumstantial evidence. Even propensity evidence can

be relevant – and was here – to show the plausibility that another person may have committed the crime. A non-party witness has no rights at stake. In arguing the plausibility of someone else having done it, it is fair to infer that a particular person has done similar things in the past and had a motive and opportunity to do it here.

The concurring opinion in *Lucas* also noted the circuit split regarding the appropriate standard to apply to the admission of other acts evidence offered by the defense. *Lucas*, 357 F.3d at 612-614. The majority rule, followed by the First, Second, Third, Fifth, and Eleventh Circuits, holds that Rule 404(b) exists to protect a criminal defendant from the prejudice of propensity taint, but the prejudice analysis should not be applied in cases where the defendant offers other act evidence of a third-party to prove some fact relevant to his defense.[2] Only two other

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[2] Footnote 3 of Judge Martin's concurrence, 606 F.3d at 873, summarizes the circuit split:

> The First, Second, Third, Fifth, and Eleventh Circuits have determined that Federal Rule of Evidence 404(b) is not applicable to evidence regarding acts of someone other than the defendant. See *United States v. Morano*, 697 F.2d 923, 926 (11th Cir.1983) (holding that "Rule 404(b) does not specifically apply to exclude . . . evidence [that] involves an extraneous offense committed by someone other than the defendant [because] the evidence was not introduced to show that the defendant has a criminal disposition . . . so the policies underlying Rule 404(b) are inapplicable."); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir.1987) (holding that "Rule 404(b) does not exclude
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circuits, the Seventh and Ninth, follow the minority rule, holding that the prejudice analysis of the rule protects every *person*, not just the criminal defendant or a victim.

The majority rule in the circuits is also followed by the majority of the states. See *State v. Hedge*, 297 Conn. 621, 1 A.3d 1051, 1069-1073 (CT, 2010) (collecting cases) ("Thus, consistent with the view of the majority of courts that have considered the issue, we conclude that the policies underlying §§ 4-4(a) and 4-5(a) of the Connecticut Code of Evidence have extremely limited applicability when the defendant

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evidence of prior crimes of persons other than the defendant."); *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir.1983) (holding that Rule 404(b) only applies to acts by the defendant individually.); *United States v. Stevens*, 935 F.2d 1380, 1401-06 (3d Cir.1991) (allowing a defendant to introduce "other crimes" evidence against a third-party under Rule 404(b) because "prejudice to the defendant is no longer a factor."); *United States v. Blum*, 62 F.3d 63, 68 (2d Cir.1995) (stating that Rule 404(b) permits "admission against third parties of evidence of 'crimes, wrongs or acts' if used to show 'motive, opportunity, intent, preparation, plan, knowledge, identity of absence of mistake or accident.'") (quoting *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d. Cir.1984)); but see *Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir.1999) (holding that Rule 404(b) "does apply to third parties."); *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir.1991) (holding that, "because Rule 404(b) plainly proscribes other crimes evidence of a person, it cannot reasonably be construed as extending only to the accused.") (internal citations and quotations omitted).

offers evidence of a character trait or other crimes, wrongs or acts to prove that someone else committed the crime charged. We are persuaded that the rules pertaining to the admission of third party culpability evidence are sufficiently stringent to protect against any unfair prejudice to the state or confusion of the issues that might arise when such evidence is offered to support a third party culpability defense.").

Rule 404(b) is based upon the common law principle that one cannot use character to prove conduct. As Judge Martin observed in concurrence, scholars agree the purpose of the rule is to protect parties, not witnesses. 606 F.3d at 873. The policy concerns behind Rule 404(b) are that a jury might convict a defendant because he is bad, or might infer that because he did something bad before, he probably committed the charged offense. The principal concern of 404(b) is prejudice, and prejudice does not apply equally to a defendant and a witness not on trial. Witnesses have nothing at stake in a trial; they simply provide information, and do not risk conviction. Because of that, the better and majority rule is that 404(b) prejudice analysis does not apply to non-parties or witnesses.[3]

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[3] See, e.g., *Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984) ("[W]e believe that the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when the prosecutor uses such evidence as a sword. . . . [R]isks of prejudice are normally absent when the defendant offers similar acts evidence of a third-party to

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Given the significance of the right to present a defense, if the reasons behind 404(b) are absent, as they are when the acts of a witness are at issue, the constitutional right to present a defense carries far more weight than evidence rule 404(b)'s concern regarding unreasonable inferences, "in the majority of circumstances, the constitutional right to present a defense easily trumps the sole remaining 404(b) interest." 606 F.3d at 874 (Martin, J., concurring.) Evidence of a witness' other acts should be admissible under a simple relevancy test. *State v. Hedge*, *supra*, at 1 A.3d 1072.

Because the Sixth Circuit viewed its own decision in *Lucas* as binding, the court was not able to reach the question whether the Michigan courts deprived Wynne of his constitutional right to present a defense under the correct standard.[4] Since Peckham could not

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prove some fact pertinent in the defense. In such cases the only issue arising under 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense."); *Stevens*, 935 F.2d 1380, 1401 (3d Cir. 1991) ("[W]hen the defendant is offering [other crimes testimony], prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.").

[4] "Had this Court correctly decided the reverse 404(b) evidence question in *Lucas*, then we could have reached the question of whether the state court ran afoul of Wynne's constitutional rights in applying its evidentiary rules to exclude some of his proffered evidence. Were I hearing this case on direct

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be prejudiced by conviction for being a bad person, the justification for excluding Wynne's evidence is greatly reduced, compared to Wynne's right to present a defense.

The exclusion of the evidence was not harmless, and it had a substantial and injurious effect in determining the jury's verdict. *Brecht v. Abramson*, 507 U.S. 619 (1993). Had the evidence been admitted, Petitioner may well have been acquitted.

This Court should grant certiorari to resolve the circuit split and adopt the majority rule which represents the better rationale. When the defense seeks to introduce "reverse 404b" evidence, the question of prejudice is irrelevant to the analysis, because none can inure to a non-party witness. The *per se* application of 404(b), regardless of which party seeks to introduce the evidence, makes the application of the state rule here arbitrary. *Rock v. Arkansas*, *supra*.

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appeal, I would have no difficulty – given the state's greatly diminished evidentiary interest – in finding that the state court erred in not permitting Wynne to present some or all of the excluded evidence in crafting his defense." 606 F.3d at 874 (Martin, J., concurring).

CONCLUSION

Petitioner requests that this Court grant certiorari and either reverse the Sixth Circuit and remand the case for issuance of a writ of habeas corpus, or reverse the case and remand to the Sixth Circuit for reconsideration.

Dated: December 30, 2010

Respectfully submitted,

JOHN MINOCK
Attorney for Petitioner

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SCOTT WYNNE, *Petitioner-Appellee,* *v.* PAUL RENICO, *Respondent-Appellant.*	Nos. 03-2319; 09-1148

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 01-10247 – David M. Lawson, District Judge.

Argued: November 18, 2009

Decided and Filed: June 4, 2010

Before: MARTIN and SUTTON, Circuit Judges;
REEVES, District Judge.*

COUNSEL

ARGUED: Brad H. Beaver, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. John R. Minock, LAW OFFICES, Ann Arbor, Michigan, for Appellee. **ON BRIEF:** Brad H. Beaver, OFFICE OF THE MICHIGAN ATTORNEY

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* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

GENERAL, Lansing, Michigan, for Appellant. John R. Minock, LAW OFFICES, Ann Arbor, Michigan, for Appellee.

SUTTON, J., delivered the opinion of the court, in which REEVES, D. J., joined. MARTIN, J. (pp. 8-12), delivered a separate opinion concurring in the reasoning and conclusion of the lead opinion.

OPINION

SUTTON, Circuit Judge. A jury convicted Scott Wynne of murdering his neighbor, Philip Timmerman, and the trial court sentenced him to life in prison. Unable to obtain relief from the state courts, Wynne petitioned the federal district court for a writ of habeas corpus. The district court granted the writ, holding that the state courts denied Wynne his constitutional right to present a complete defense when it refused under state evidentiary rules to admit propensity evidence designed to show that someone else – namely, the prosecution's key witness – committed the murder. We reverse.

I.

On May 18, 1995, Timmerman was shot to death while working on his farm. No eyewitnesses to the shooting emerged, but several pieces of physical evidence linked Wynne to the crime. Ballistics evidence identified Wynne's .45 caliber pistol as the

murder weapon. Wynne's fingerprint appeared on the weapon's ammunition magazine. And footprints at the crime scene matched boots found in Wynne's house. Wynne also had a motive. Three days after the shooting, Wynne's friend Mark Peckham contacted the police, telling them that he had heard Wynne say he wanted to kill Timmerman on several occasions, apparently because he thought Timmerman's long-term lease on the Wynne family farm would terminate upon Timmerman's death. Wynne was so frustrated about his land dispute with Timmerman, Peckham said, that he spoke with Peckham ten to thirty times about murdering Timmerman, sometimes in conversations that turned into detailed descriptions of how he would carry out the crime.

In October 1995, Wynne stood trial for Timmerman's murder. As part of his defense, Wynne alleged that Peckham had killed Timmerman. The trial court allowed Wynne to introduce the following evidence to support this theory: Peckham wanted to frame him to retaliate for various wrongs, including Wynne's purported firing of Peckham five months before the murder; Peckham acknowledged he had fired some of Wynne's guns in the past and knew where Wynne kept most of his guns, including the .45 caliber murder weapon; Peckham told an investigator he was "really pissed" at Wynne because Wynne "had everything given to him and never returned anything to [his] family," App'x at 2086; and Peckham's insurance agent testified that Peckham had told him at least three or four times in the week after Wynne's arrest that Peckham was "going to put [Wynne] away," *id.* at 2180.

The trial court, however, drew the line at evidence directed only to Peckham's bad character. The court excluded testimony by Peckham's former girlfriend that, eight years before the murder when she was in middle school, he had threatened to cut off the fingers of a classmate who touched her breasts. It excluded her testimony that, several years earlier, Peckham had abused her and threatened to kill her and that Peckham's trailer mysteriously burned down within hours of their break-up. It excluded testimony that, after a failed suicide attempt five years earlier, Peckham declined psychologically, becoming "passive aggressive" and intent on exacting revenge in secretive ways. *Id.* at 1952. And it excluded evidence of Peckham's alleged admission to a co-worker several months before the murder that he had "done something so bad in his past that if the police ever found out about it he would go to prison for life." *Id.* at 2070.

The trial court also excluded evidence about Peckham's apparent interest in women's underwear. At some point during the trial, Wynne's investigator discovered a blue bag in Wynne's house, which contained a boot with tread that matched the footprints found at the crime scene. The defense did not mention until several days after delivering the bag to the court that it found a black camisole near the bag. With this evidence, the defense sought to link Peckham to the bag via his apparent underwear fascination, but the court would not allow it.

A jury convicted Wynne of murder, and the trial court sentenced him to life in prison. *See People v.*

Wynne, No. 192512, 1999 WL 33328893, at *1 (Mich. Ct. App. Dec. 3, 1999). After failing to obtain relief in the state courts, Wynne filed a petition for a writ of federal habeas corpus in June 2001, arguing that the trial court violated his constitutional right to present a complete defense by excluding the Peckham evidence. In September 2003, the district court granted the writ. *See* 279 F. Supp. 2d. 866 (E.D. Mich.). After the State filed a notice of appeal, both parties alerted the district court that it had premised part of its ruling on several factual inaccuracies in Wynne's pleadings, which the Michigan Attorney General's Office had failed to notice. At Wynne's request, we remanded the case to the district court to take a second look at the case, including the new light cast on it by the revised characterizations of the evidence. In January 2009, the district court issued a supplemental opinion, which also granted the writ but revised its reasons for doing so. *See* 595 F. Supp. 2d. 775.

II.

Although Wynne filed his habeas petition after the Anti-Terrorism and Effective Death Penalty Act of 1996 went into effect, *see Lindh v. Murphy,* 521 U.S. 320, 326 (1997), we give fresh review to his federal claim because the state courts addressed only his state law grounds for relief, *see Wynne,* 1999 WL 33328893, at *1, which means they did not "adjudicate[ ]" the federal claim "on the merits," 28 U.S.C. § 2254(d); *see Maples v. Stegall,* 340 F.3d 433, 436

(6th Cir. 2003) ("Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply."). The State does not argue that Wynne has failed to exhaust his federal claim in the state courts or that a procedural bar otherwise applies to this claim.

The Constitution guarantees "a meaningful opportunity to present a complete defense," *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quotation marks omitted), but "not an unlimited right to ride roughshod over reasonable evidentiary restrictions," *Rockwell v. Yukins,* 341 F.3d 507, 512 (6th Cir. 2003) (en banc). A defendant must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). The right to present a complete defense – including the third-party culpability defense raised here – thus does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be "arbitrary" or "disproportionate to the purposes they are designed to serve." *United States v. Scheffer,* 523 U.S. 303, 308 (1998) (quotation marks omitted).

The question here, then, is not whether the Michigan courts properly construed one of the State's evidentiary rules, namely Evidence Rule 404(b)'s prohibition against introducing character evidence to show that an individual acted consistently with the evidence. It is whether the state courts' construction

of their evidentiary rule – a matter for them, not for us, to decide – violates the Sixth Amendment right to present a complete defense.

Unfortunately for Wynne, we already have resolved the point. In *United States v. Lucas,* 357 F.3d 599 (6th Cir. 2004), the defendant tried to introduce propensity evidence – a previous conviction for cocaine possession – to prove that a third party, not the defendant, committed a drug crime. *Id.* at 604. Relying on *Federal* Rule 404(b), which likewise bars evidence about a person's character "in order to show action in conformity therewith," the district court excluded the evidence. In affirming, we first explained that Federal Rule 404(b) applies to all propensity evidence, whether used to show that the defendant or another individual acted in conformity with their prior misconduct. *Id.* at 606. We then rejected Lucas' constitutional argument. The Sixth Amendment right to present "a complete defense," we explained, "does not imply a right to offer evidence that is otherwise inadmissible under the standard rules of evidence." *Id.* And "[t]he exclusion of [the third party's] prior conviction," we explained, "did not violate Lucas's constitutional right to present a defense," because "Lucas was able to explore her theory that [another individual] was in fact the culprit" through other evidence. *Id.* at 606-07.

What was true in *Lucas* is true today. Just as Federal Rule 404(b) permissibly limited Lucas's right to introduce propensity evidence directed toward a third party, so the same kind of state law evidentiary

rule – indeed essentially the same rule, *see* MICH. R. EVID. 404(b) – permissibly limited Wynne's right to introduce propensity evidence about Peckham. And just as this rule did not bar Lucas from introducing *other* evidence to support this defense, so the same was true for Wynne, who introduced considerable non-propensity-based evidence in support of the Peckham-did-it defense. The court, for example, allowed Wynne to introduce the following: Peckham wanted to frame Wynne to retaliate for various wrongs, including Wynne's purported firing of Peckham five months before the murder; Peckham acknowledged he had fired some of Wynne's guns in the past and knew where Wynne kept most of his guns, including the .45 caliber murder weapon; Peckham told an investigator he was "really pissed" at Wynne because Wynne "had everything given to him and never returned anything to [his] family," App'x at 2086; and Peckham's insurance agent testified that Peckham had told him at least three or four times in the week after Wynne's arrest that Peckham was "going to put [Wynne] away," *id.* at 2180. The state trial court, in short, permitted Wynne to introduce considerable evidence that Peckham was the murderer, and accordingly its reasonable limit on sheer propensity evidence, some of it eight years old and much of it far removed from the issues in the case, did not deprive Wynne of his right to make a complete defense.

That leaves one other contention – that the state trial court misapplied its own rule of evidence. But

we cannot grant the writ based on our disagreement with "state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 68 (1991), unless the state-court determination is so "fundamentally unfair" that it deprives a defendant of due process, *Bey v. Bagley*, 500 F.3d 514, 519-20 (6th Cir. 2007). Wynne does not argue that the state court's application of Michigan Rule 404(b) was so askew that it violated this standard. And his explanations for introducing the evidence – that it would show Peckham's "character for seeking secretive revenge, his violent tendencies, mental deterioration, and readiness to frame another" and that Peckham "was capable of murdering Timmerman" and framing Wynne, Wynne's Br. at 46 – represent precisely the kind of propensity evidence that any court (state or federal) reasonably could exclude, whether under Rule 404(b) or for that matter under Rule 403.

In defense of the district court's contrary ruling, we note that it faced a more vexing question when it first granted the writ in 2003. Not only had our 2004 *Lucas* decision not yet come down, but the parties' filings up to that point also suggested that Peckham's episodes of erratic behavior occurred soon before – and even soon after – Timmerman's murder. It later became clear that much of Wynne's propensity evidence against Peckham stemmed from events up to eight years earlier. Now that the parties have corrected the record, and now that we have *Lucas* to guide us, there is far less to Wynne's position.

III.

For these reasons, we reverse the district court's judgment.

CONCURRENCE

BOYCE F. MARTIN, JR., Circuit Judge, concurring. I concur in the reasoning and conclusion of the lead opinion, but do so with reservations because the analysis and conclusion are based on a faulty precedential foundation. The majority has found that the district court erred in granting Scott Wynne habeas relief on the ground that the state court denied Wynne his constitutional right to present a defense. The state court refused under state evidentiary rule 404(b) to admit evidence that Wynne proffered to show that a third party committed the murder and framed Wynne for its commission. As the majority states, we cannot grant habeas relief solely because we disagree with a state court's interpretation of its own evidentiary rules. Rather, in order to grant habeas in this case, we must find that the state court's application of its evidentiary rules (1) were arbitrary and disproportionate to the purpose the state rule was designed to serve, and (2) deprived Wynne of his Sixth Amendment right to present a

defense.[1] Further, as the majority correctly points out, in *United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004) we held that the identical 404(b) analysis engaged in by the Michigan state court also applies in this Court "generally . . . in cases where such evidence is used with respect to an absent third party not charged with any crime." Because it makes no sense to contend that it violates the Constitution for a state court to apply an evidentiary rule in a certain way but that a federal court can, I cannot dissent from the majority's opinion.[2] Thus, I must concur, but I do not like the result we reach.

However, I write separately because I believe that the *Lucas* opinion was wrongly decided. As was pointed out in the concurrence to the *Lucas* opinion, there is a split among the circuits regarding the appropriate standard to apply to reverse 404(b) admitted

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[1] The majority discusses the fact that this case involves a state court applying state evidentiary rules. It is true that Michigan has never adopted the Federal Rules of Evidence per se, but as the Michigan Rules of Evidence advisory notes state, "MRE 404(b) is identical with Rule 404b of the Federal Rules of Evidence except that the word 'plan' is replaced by the phrase 'scheme, plan, or system in doing an act,' and there is added the phrase 'when the same is material, whether such other crime, wrongs, or acts are contemporaneous with, or prior or subsequent to the crime charged.'" MICH. R. EVID. 404, 1978 advisory committee's note.

[2] The current case, while similar to *Lucas* in many respects, also differs in several substantive ways. Thus, I believe that, had this case been brought under federal law, it is easily distinguished from *Lucas*.

evidence. *Lucas*, 357 F.3d at 612. The majority of circuits have rightly held that Rule 404(b) primarily exists to protect a criminal defendant from the prejudice of propensity taint and should not be applied in cases where, as here, the defendant offers prior-act evidence of a third-party to prove some fact relevant to his defense.[3] Only two other circuits have taken the

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[3] The First, Second, Third, Fifth, and Eleventh Circuits have determined that Federal Rule of Evidence 404(b) is not applicable to evidence regarding acts of someone other than the defendant. *See United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) (holding that "Rule 404(b) does not specifically apply to exclude . . . evidence [that] involves an extraneous offense committed by someone other than the defendant [because] the evidence was not introduced to show that the defendant has a criminal disposition . . . so the policies underlying Rule 404(b) are inapplicable."); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) (holding that "Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant."); *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir. 1983) (holding that Rule 404(b) only applies to acts by the defendant individually.); *United States v. Stevens*, 935 F.2d 1380, 1401-06 (3d Cir. 1991) (allowing a defendant to introduce "other crimes" evidence against a third-party under Rule 404(b) because "prejudice to the defendant is no longer a factor."); *United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995) (stating that Rule 404(b) permits "admission against third parties of evidence of 'crimes, wrongs or acts' if used to show 'motive, opportunity, intent, preparation, plan, knowledge, identity of absence of mistake or accident.' ") (quoting *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d. Cir. 1984)); *but see Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir. 1999) (holding that Rule 404(b) "does apply to third parties."); *United States v. McCourt*, 925 F.2d 1229, 1232 (9th Cir. 1991) (holding that, "because Rule 404(b) plainly proscribes other crimes evidence of a person, it cannot reasonably be construed as extending only to the accused.") (internal citations and quotations omitted).

approach of the *Lucas* majority, holding that the plain language of the rule, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of *a person* in order to show action in conformity therewith", FED. R. EVID. 404(b) (emphasis added), protects every *person,* not just the criminal defendant or a victim.

Rule 404(b) was born of the common law in an effort to protect parties from wrongful inferences derived from character evidence. The "reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question." 22 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5239 (1st ed. 1978) (noting that it "has long been accepted in our law . . . [t]hat the doing of one act is in itself no evidence that the same or a like act was again done by the same person." Charles Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law* § 192, p. 642 (3d ed. 1940) (emphasis added)). Although this logic could theoretically apply equally to defendants, victims, or third parties, Wigmore points out that the common law rule barring prior bad act evidence existed to prevent the inference that a "defendant in a criminal case" perpetrated the "criminal act charged." Charles Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law* §§ 355-56, p. 81. (3d ed. 1942); *See also United States v. Dudek,* 560 F.2d 1288, 1295-96 (6th Cir. 1977) (stating that Rule 404(b) restates the common law). Furthermore, history makes clear that the policy underlying the rule at common law sought to protect the *criminal*

defendant. See Wright & Graham, *Federal Practice and Procedure: Evidence* § 5239, pp. 436-39 (1978). Moreover, although the 404(b) Advisory Committee Notes do not clarify the meaning of "a person", they generally discuss prosecutorial use of propensity evidence against a defendant and the use of propensity evidence to show that a victim "had it coming." The notes give no indication that they were intended to protect any other party.

We have summarized the policy concerns driving Rule 404(b), noting that "two concerns are expressed by the first sentence of Rule 404(b): (1) that the jury may convict a 'bad man' . . . and (2) that the jury will infer that because the *accused* committed other crimes, he probably committed the crime charged." *United States v. Phillips,* 599 F.2d 134, 136 (6th Cir. 1979) (emphasis added). In short, 404(b) deals with (a) concerns that a jury will make prejudicial inferences based upon someone being a "bad guy" and thus convict a defendant and (b) logically dubious inferences based upon an imagined connection between past acts and current ones.

Generally, the concern with dubious inferences applies to defendants and to third parties, as it is equally irrational to assume that, because either a defendant or third party committed a past bad act, he is somehow connected to a particular current bad act. Here, this concern seems equally applicable to both Wynne and Peckham.

However, the prejudice concern does not apply equally to a defendant and a third party not being tried for a crime. Specifically, a third party not on trial for a crime is in no danger whatsoever that the jury will convict him for being a "bad man." Thus, here and in probably most reverse evidence cases, one of 404(b)'s two justifications would vanish completely. In such a situation, one wonders if, left with only one pillar to support it, the whole structure of 404(b) collapses under the weight of a defendant's constitutional right to present a defense.[4] Most circuits have

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[4] The absence of prejudice in the context of reverse 404(b) evidence has been emphasized by other circuits. The Second Circuit has noted that:

> [W]e believe that the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when the prosecutor uses such evidence as a sword. . . . [R]isks of prejudice are normally absent when the defendant offers similar acts evidence of a third-party to prove some fact pertinent in the defense. In such cases the only issue arising under 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.

Aboumoussallem, 726 F.2d at 911-12 (internal citations omitted). The Third Circuit makes similar observations:

> [W]hen the defendant is offering [other crimes testimony], prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused in entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.

Stevens, 935 F.2d at 1401 (citation omitted).

found that it does. *See supra* n. 3. Given the great weight that our Constitution and society place on the right to present a defense, if the policy reasons driving 404(b) are considerably weakened – as they are in cases of reverse 404(b) evidence – in the majority of circumstances, the constitutional right to present a defense easily trumps the sole remaining 404(b) interest. This Court is clearly on the losing side of the equation. It is my hope that this Court and other courts will see the wisdom of distinguishing close cases involving important Sixth Amendment questions from *Lucas* and will admit 404(b) evidence under a simple relevancy-balancing test, thus erring on the side of allowing defendants to present their best defense.

Had this Court correctly decided the reverse 404(b) evidence question in *Lucas*, then we could have reached the question of whether the state court ran afoul of Wynne's constitutional rights in applying its evidentiary rules to exclude some of his proffered evidence. Were I hearing this case on direct appeal, I would have no difficulty – given the state's greatly diminished evidentiary interest – in finding that the state court erred in not permitting Wynne to present some or all of the excluded evidence in crafting his defense. I recognize, however, that AEDPA requires a more exacting level of deference. Regardless, I believe that the same interest that would require admission of this evidence in a direct appeal case applies equally to Wynne's habeas attack. The fact that, as a third party, there is no risk that Peckham would be unfairly convicted for being a "bad person" drastically reduces

the need to exclude the questionable evidence, while Wynne's need to present a defense remains just as weighty.[5] Thus, sitting in habeas, but for *Lucas,* I would find that the evidence was excluded in violation of Wynne's constitutional rights.

However, as this panel is bound by the decisions of a prior panel, no matter how illogical,[6] I must concur.

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[5] It is true that Wynne was permitted to present some evidence regarding Peckham's alleged scheme to murder. However, given that some of the excluded evidence would have helped Wynne show that Peckham had (1) suffered a mental breakdown, (2) declined psychologically since that time, (3) allegedly attempted to frame someone else for a crime he had committed in the past, and (4) other evidence tending to substantiate Wynne's defense, its probative value was likely substantial.

[6] A published prior panel decision "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Rutherford v. Columbia Gas,* 575 F.3d 616, 619 (6th Cir. 2009) (citing *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985)).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SCOTT WYNNE,

Petitioner,

v.

PAUL RENICO,

Respondent. /

Case No. 01-10247-BC

Honorable
David M. Lawson

SUPPLEMENT TO OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

In 1995, the petitioner was convicted in a Michigan state court of murdering Philip Timmerman in a dispute over a piece of land the petitioner's family owned and Mr. Timmerman leased. The petitioner filed a petition for writ of habeas corpus in this Court through counsel, arguing, among other things, that his constitutional rights were violated because the state court refused to allow him to introduce certain evidence that tended to show that Mark Peckham, the State's principal witness against the petitioner, actually committed the murder and framed the petitioner. The Court conditionally granted the petition. The Court observed that the right to present witnesses in one's defense was clearly established as a fundamental element of due process to which certain state evidentiary rules must yield. The Court then held that the state trial court violated the petitioner's

right by excluding exculpatory evidence based on its application of state evidence rules, which the trial court did not apply correctly, and that the excluded evidence would have substantially influenced the jury's decision.

Shortly after the opinion granting the writ was filed, the Court was notified that the petitioner's first brief contained factual inaccuracies that may have influenced the Court's decision. The Court stayed the order granting the writ and permitted the parties to submit supplemental briefs addressing the factual inaccuracies. The Court has carefully examined the record again in light of the parties' supplemental submissions. The Court concludes that although there are discrepancies between the description of the facts in the petitioner's brief and the record (to which the respondent originally acquiesced), the Court remains convinced that evidence excluded from the petitioner's trial resulted in a denial of his constitutional rights under the Due Process Clause and the Sixth Amendment, and the state courts' conclusions otherwise constituted an unreasonable application of clearly established federal constitutional law as determined by the Supreme Court.

I.

The facts of the case are recounted in the Court's original opinion, *Wynne v. Renico*, 279 F. Supp. 2d 866, 868-75 (E.D. Mich. 2003). These facts were taken from the record, viewed through the lens of the

petitioner's brief drafted by his attorney, who continues to represent him. The respondent, represented by the state attorney general, filed a response to the petition, which took no issue with the factual representations in the opening brief. In fact, it appears that the attorney general merely copied the statement of facts from the state prosecutor's brief filed in the state appellate court, and it was not until the Court filed its opinion that the respondent read the record. Thereafter, the petitioner's attorney acknowledged the inaccuracies in his representations to the Court, which focus primarily on four areas. The respondent contends that some additional arguments by the petitioner misapprehends the State's trial theory and did not represent the record in the light most favorable to the State.

First, the initial brief stated that Mark Peckham showed an unregistered gun to his ex-girlfriend, Melissa Hill, and threatened to kill her if she told her family about the gun. In fact, Peckham threatened to kill himself, not Ms. Hill, if she told her family about the gun. However, he did threaten to kill her on another occasion. Hill testified:

> Q. Okay. Did he [Peckham] ever show you a hand gun that he had?
>
> A. Yes, he did.
>
> Q. Did he tell you that he got it from anyone? Who did he tell you that he got it from?
>
> A. I recall a hitchhiker, that's what I have in my mind.

Q. What did he say when he showed you the gun?

A. He had told me that he picked it up from a hitchhiker and I was going to tell his family that he had it and he told me that if I told anyone that he had it that he would kill himself.

Q. Did he ever threaten to kill you?

A. Yes.

Q. On more than one occasion?

A. Yes.

. . .

Q. Was there another thing that he told you never to tell and if you told that he would kill you?

A. Yes.

Q. What is that?

A. He –

Q. What did he do?

A. He took females' underwear.

Trial Tr. vol. IX, 297-98, Oct. 30, 1995.

Second, the initial brief stated Peckham confessed to Melissa Hill that he had burned down their trailer after they broke up. This is not true. Peckham did not admit that he burned down the trailer. Rather, it was

Hill who suspected him of doing so. Hill testified as follows:

> Q. Now Missy, at some point you broke up with Mark [Peckham]. Is that correct?
>
> A. Yes, I did.
>
> Q. Within 24 hours of breaking up with him what happened?
>
> A. I recall it within 24 hours, that's what it seems like to me.
>
> Q. Okay.
>
> A. His trailer, the trailer that we stayed at, burnt down.
>
> Q. Did he ever admit to you that he burned the trailer down?
>
> A. No, he did not.

Trial Tr. vol. IX, 301, Oct. 30, 1995.

Third, the initial brief stated that Peckham was at the petitioner's house the day of the murder. Actually it was two days before the murder. Peckham testified at the trial:

> A. . . . Then on Tuesday the following week I stopped and looked at the lawn mower again, to just look at it.
>
> Q. The lawn mower was at the Wynne residence when stopped on Tuesday?
>
> A. Yes.

Q. Was that two days before the shooting?

A. The shooting happened on – yes, it was two days.

Q. The shooting happened on the 18th, a Thursday, just to help you.

A. It was on the 16th that I had stopped there. . . .

Trial Tr. vol. VI, 51, 53, Oct. 24, 1995.

The respondent makes much of this discrepancy, arguing that the difference in those facts severely weakens one pillar supporting the theory that Peckham framed the petitioner. The respondent states the petitioner told the police during an interview that his .45 pistol was "definitely" in his bedroom two nights prior to the murder. Detective O'Reilly did testify that the petitioner "stated that it [the gun] had definitely been there two nights before." Trial Tr. vol. IV. 15, Oct. 19, 1995. This would directly contradict the petitioner's claim that Peckham stole the gun from the petitioner's house on the day of the murder since Peckham was not there that day, or that he stole it on his visit two days prior since the gun was still there after Peckham's visit.

On this point, it appears that it is the respondent that is taking creative license with the record. The petitioner denied telling Detective O'Reilly that the .45 was "definitely" on his bed post two nights before the murder. Although Detective O'Reilly did, in fact, testify that the petitioner made such a statement, a

transcript of the interview reveals that Detective O'Reilly was wrong. O'Reilly said several times that the petitioner saw the gun two nights before, but the petitioner never made that statement. The interview transcript reads:

> WYNNE: My forty[-]four is on the right and my forty[-]five is on the left, right by the night stand.
>
> O'REILLY: Up by your head?
>
> WYNNE: Yep, there's one on each side.
>
> (O'REILLY exits a moment) (pause for a few minutes) (DETECTIVE O'REILLY re-enters)
>
> O'REILLY: Excuse me, I don't know how to tell you this partner, but you're [sic] gun isn't there.
>
> WYNNE: It was there, I don't know if it was there last night, but it was there this weekend, this last weekend.
>
> O'REILLY: That forty[-]four is there, the forty[-]five isn't.
>
> WYNNE: It was hanging right on the left side of the bed post. That's where it always hangs. I take it over to NOR, I spend the weekends over at my girlfriend's house, and I take it over to her house sometimes on the weekend.
>
> O'REILLY: You're sure it's not there?
>
> WYNNE: Yep.

. . .

O'REILLY: Two nights ago you know for a fact it was there, you don't remember within the last day, taking the forty[-]five in a shoulder rig, doing something with it?

WYNNE: I, I never do anything with it. Like I said, I take it over to NORMA' S on the weekends.

. . .

WYNNE: O.K., well I've got a lot of other guns. I can give you a detailed list of every gun I've got. It was there PAT. I, I had it at NORMA' S. I don't remember if I had it last weekend, but I know I had it the weekend before.

O'REILLY: When was the last time you had it at NORMA'S?

WYNNE: It was either last weekend or the weekend before.

O'REILLY: But you also said that two nights ago, it was hanging on your bed post.

WYNNE: I'm fairly certain it was. I always check to make sure there's a gun hanging on my bed post, before I go to bed.

O'REILLY: So, did you check last night?

WYNNE: I don't know if I did last night.

App. 11 to Pet. for Writ at 82, 84-85.

Fourth, and perhaps most importantly, the initial brief represented that after Timmerman wads [sic] killed, Peckham told Kathy Hinson that he had done something so wrong that if the police ever found out he would go to prison for life and that hunting men was more fun that hunting animals. However, in fact Ms. Hinson would have testified that Peckham made these statements to her six months *before* the murder, not after the murder, and therefore they could not have been a reference to the murder of Mr. Timmerman. Ms. Hinson was prepared to testify that she worked with Peckham in November or December 1994, six months before the murder, and that

> Mark Peckham has said to her that he has done something so bad in his past that if the police ever found out about it he would go to prison for life. He also has made statements to her that if – that he plays paintball because it's more fun to hunt men than animals. He repeated the statement about going to prison for life twice to her.

Trial Tr. vol. X, 92-93, Oct. 31, 1995. It is not clear from the record when Peckham made the statements to her. The trial court sustained the State's objection to the introduction of that evidence. The petitioner's attorney asked to have Ms. Hinson testify to these facts outside the jury's presence, but the judge ruled that this was not necessary: "Let's conserve time here and I'll accept your statement as to what her testimony will be. You can go on without objection. Why don't you just state it on the record." *Id.* at 92.

Next, the respondent states the petitioner's brief mis-stated the prosecution's theory of motive, which concerned the terms of the land lease between the victim and the petitioner's family. However, the Court was not misled by that argument. The respondent also claims that Peckham has an alibi for the Timmerman murder. He says that Amy and Jack Madelinski, Peckham's sister-in-law and father-in-law, testified that Peckham was at their house the night of the murder, leaving between 10:30 p.m. and 10:35 p.m. to go to work. Peckham is seen on his employer's security camera arriving at work at 10:50 p.m. The murder was committed between 10:22 and 10:37 p.m. However, Ms. Madelinski's testimony about Peckham's departure time was equivocal. She testified that he "probably" left around 10:35 p.m. because "he usually just didn't leave very early" and he didn't have to be to work until 11 p.m. Trial Tr. vol. XI, 274, Nov. 1, 1995. Likewise, Mr. Madelinski testified that Peckham "generally leaves to work about I'd say 10:30 or twenty-five minutes to 11:00." *Id.* at 276-77. Mr. Madelinski did not know what time Peckham left for work that specific night.

The respondent also states that the petitioner failed to discuss evidence that inculpated him. For instance, the respondent points to evidence that the petitioner and the victim had an argument the day of the murder. Benny Koteras testified that he stopped by the petitioner's house the night of the murder and found the petitioner target practicing in the yard. Mr. Koteras told the petitioner he had just seen the

victim working in the field. The petitioner told Mr. Koteras that he had "words" with the victim earlier that day. The petitioner appeared angry, and Mr. Koteras believed he was angry about the disputed land. Mr. Koteras testified that the petitioner was using a .22 pistol. The victim was shot one time with a .22. However, the petitioner states all of his firearms were accounted for, including the .22 he was shooting that day, and none were found to match the .22 bullet recovered from the victim's body. Detective O'Reilly testified as follows:

> Q. When did you become aware that a .22 that apparently was used in the shooting had not been recovered by the Sheriff's Department?
>
> A. After Mr. – or Sergeant Michael Burritt came out from the Michigan State Police Crime Lab and had analyzed the guns that had been provided to him via a search warrant. We were then advised that the bullets that were recovered – let me revise that – Sergeant Burritt did an analysis; shortly after he did an analysis we were informed that he did not have the .22 that was used to shoot Mr. Timmerman.
>
> Q. Did you testify yesterday that you got all of Scott's long guns that he told you about; is that what I heard you testify?
>
> A. It's my understanding that we got all the long guns that were there that night.

Q. None of those generated the .22 that was used to shoot Mr. Timmerman?

A. That is correct.

Trial Tr. vol. IV, 30-31, Oct. 19, 1995.

The respondent also states that the petitioner did not mention evidence that placed him at the murder scene. The respondent makes reference to the testimony of Beau Preston, who lived near the murder scene, who testified that he saw a truck driving very quickly down 118th Avenue towards the petitioner's house sometime after 10 p.m. the night of the murder. The witness identified a picture of the petitioner's truck as possibly the truck he saw:

Q. Something happened that night, right? That got your attention?

A. Yeah.

Q. Okay. What was it that got your attention?

A. What do you mean? What I gave a statement about?

Q. Yeah, that's – you made a statement about this before to some other people, right?

A. Yeah, it was – well, my mom was upstairs at this time and we heard acceleration from an automobile truck. We looked up and we saw a truck or whatever.

. . .

Q. And, do you have any idea about what time it was that this happened?

A. Not really. It was past ten o'clock.

. . .

Q. Did you tell Detective O'Reilly that originally you didn't think – when he showed you this picture [of the petitioner's truck], originally you didn't think that that was the pickup?

A. No, I said that could possibly be the pickup or it could – it might not be the pickup.

Q. Okay.

A. The same thing –

Q. Pardon?

A. The same thing I'm saying. It could possibly 'cause it's got the same features as I've explained, but it might not be the pickup.

Trial Tr. vol. VI, 225, 227, 238, Oct. 24, 1995.

However, Beau Preston and his mother Sharon Bellingar originally told Officer Ross that the truck went by around 9:30 p.m.:

Q. And, did you interview or speak with a Beau Preston at that time?

A. Yes.

Q. Did you recall that he believed he saw a brown truck around 9:30 p.m.?

A. On the evening before he saw the truck, yes.

Q. Do you recall the time that he said?

A. He believed it was around that time because it was just getting kind of twilight, dusk.

Q. Did you recall writing 9:30 in your police report?

A. Yes.

. . .

Q. Did you later interview a Mrs. Sharon Bellingar?

A. Yes, I did.

Q. And, in talking to her do you recall her stating that approximately 9:30 or shortly thereafter she and her son were upstairs in her house and saw a truck?

A. Yes.

Q. So, you recall the time that she said as well would be 9:30.

A. Yes.

Trial Tr. vol. IX, 200-02, Oct. 30, 1995. The petitioner further notes that Beau Preston's testimony was that the petitioner's truck might or might not be the truck he saw.

The respondent concludes by contending that all of the petitioner's issues ought to be relegated to disputes over state evidentiary rulings. Those, he insists, are too insubstantial to justify the issuance of a writ under 28 U.S.C. § 2254(d), and he believes that the Sixth Circuit's decision in *Rockwell v. Yukins*, 341 F.3d 507 (6th Cir. 2003), controls.

II.

Certainly, mere errors in state evidence law will not support a claim that a prisoner is in custody in violation of the Constitution or laws of the United States. This Court acknowledged that rule in its original opinion, when it stated:

> To be sure, errors in state evidence law will not support the issuance of the writ unless those errors rendered the trial fundamentally unfair. See Clemmons v. Sowders, 34 F.3d 352, 357 (6th Cir. 1994) (holding that "[h]abeas review does not encompass state court rulings on the admission of evidence unless there is a constitutional violation"). The Court of Appeals for the Sixth Circuit has explained that
>
> > "[e]rrors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding." *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). Generally, state-court evidentiary rulings cannot rise to the level of due process

> violations unless they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967).
>
> *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001) (second alteration in original). However, this Court finds that the petitioner has raised an issue of constitutional dimension that was neither properly addressed nor correctly decided by the state courts: the right to present a defense incorporated in the Sixth Amendment.

Wynne v. Renico, 279 F. Supp. 2d at 879. However, the thrust of the Court's earlier opinion was on the Sixth Amendment's basic guarantee of "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This Court observed that an accused has the right at trial to present testimony that is "relevant," "material," and "vital to the defense." *Washington v. Texas*, 388 U.S. 14, 16 (1967). *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity

to present a complete defense'") (internal citations omitted).

The Court also discussed the point that the "right to present relevant evidence is not unlimited," and "is subject to reasonable restrictions" imposed by the criminal process. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

> As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

Ibid (citations and quotation omitted). The state courts's opinions in this case never addressed the concept of proportionality established by the Supreme Court. And it is that point that distinguishes this case from *Rockwell v. Yukins* and a later case on the same point, *Varner v. Stovall*, 500 F.3d 491 (6th Cir. 2007).

Rockwell v. Yukins held that a state's decision to exclude evidence that a victim of a crime had sexually abused his children because its probative value was outweighed by the possibility of unfair prejudice was not an unreasonable application of Supreme Court case law. The petitioner in that case was convicted of

conspiring with her sons to kill her husband, their father. The trial court excluded evidence that the victim had sexually abused his sons, the petitioner's alleged coconspirators. The district court granted the writ on the grounds that the petitioner's Sixth Amendment right to present a complete defense had been violated. The Sixth Circuit, en banc, reversed the grant of the writ, with four judges dissenting.

The actual attempt to murder the victim was committed by one of the sons and two of his friends. However, the petitioner had "engaged in discussions with one or more of her sons about killing Mr. Rockwell. On the strength of these discussions, the State of Michigan charged Mrs. Rockwell with conspiracy to commit murder." *Rockwell*, 341 F.3d at 509. The petitioner's defense was that the talk of killing the victim was "some sort of talk therapy" to help her sons deal with their hatred of their father, not any agreement to actually murder him. The state trial court held that the evidence of abuse was not material under state evidentiary rules. The state court of appeals affirmed, stating that the probative value of the abuse was substantially outweighed by the danger of unfair prejudice. On appeal to the Sixth Circuit, the petitioner did not argue that the state court decision was "contrary to" Supreme Court case law. Instead, she argued that the state court decision was an "unreasonable application" of the law. The Sixth Circuit rejected this argument, noting the difference between an unreasonable application of the law and a mere incorrect or erroneous application of the

law. The court did not believe the Michigan Court of Appeals decision finding that the probative value of the evidence was outweighed by its prejudice was objectively unreasonable:

> A defendant's right to present a "complete" defense, in other words, does not automatically trump state evidentiary rules. The competing interests must be balanced, and "a defendant's interest in presenting . . . evidence may [have to] bow to accommodate other legitimate interests in the criminal trial process." *Id.* (Internal quotation marks and citations omitted.)
>
> It was not objectively unreasonable, in our view, for the Michigan court to conclude that "other legitimate interests in the criminal trial process" outweighed Mrs. Rockwell's interest in presenting evidence of her husband's prior conduct. The evidence of sexual abuse posed a substantial danger of unfair prejudice – a risk that the jury would be tempted to acquit Mrs. Rockwell not because of any sense that she was innocent of conspiring with her sons to kill Mr. Rockwell but because of a sense that killing would be too good for such a man.

Rockwell, 341 F.3d at 513. *Rockwell* cites *United States v. Scheffer*, 523 U.S. 303 (1998), the case noted above

In my original opinion, I summarized the Michigan Court of Appeals decision in the present case,

dealing with evidentiary matters that the State does not challenge presently, as follows:

> In this case, the state court of appeals held that evidence of Peckham's conduct toward his former girlfriend and her new boyfriend, and the evidence of his theft of women's undergarments, was impermissible propensity evidence excludable under the first sentence of Michigan Rule of Evidence 404(b), which states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Wynne v. Renico, 279 F. Supp. 2d 866, 883 (E.D. Mich. 2003). I concluded that the state court decision was an unreasonable application of Supreme Court law and conditionally granted the petition, stating:

> It is clear that the defendant's right to present evidence is not absolute, and that the State may place reasonable limitations on the introduction of evidence in criminal proceedings. *See, e.g., United States v. Scheffer*, 523 U.S. 303 (1998) (holding that the proscription against the introduction of polygraph examination results contained in Military Rule of Evidence 707 did not violate the Due Process Clause). However, the unavoidable conclusion to be drawn from the Supreme Court's cases is that the "the right to present . . . witnesses to establish a defense" is clearly established as "a fundamental element of due process of law." *See Washington*, 388 U.S. at 19. State evidence rules must yield to

> this fundamental right when they "plainly interfere[ ] with [the defendant's] right to defend against the State's charges," *Chambers*, 410 U.S. at 298, particularly when such rules are "disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 56. A state court's interpretation of its evidence rules that results in the denial of the defendant's right to present a defense, most notably the defense of third-party culpability as in *Chambers*, especially when the state court interprets the evidence rules incorrectly, is an unreasonable application of this clearly established constitutional rule.

Wynne v. Renico, 279 F. Supp. 2d at 882.

As the Sixth Circuit noted in *Rockwell*, a state must balance the defendant's right to present a complete defense against "other legitimate interests in the criminal trial process." *Rockwell*, 341 F.3d at 513. Only if the state's balancing is unreasonable can a habeas petition be granted. It would be objectively unreasonable for the Michigan courts to conclude that the state's interest in enforcing Michigan Rule of Evidence 404(b) outweighed the defendant's right to present evidence that a third person, namely the prosecution's chief witness, committed the crime. The state's interest in enforcing Rule 404(b) is much weaker in this case than the interest of the state in *Rockwell*. In *Rockwell*, the state's interest was in preventing jury nullification or the sanctioning of vigilante justice against a child molester or abuser. The court found that the state could reasonably

conclude that this interest "outweighed Mrs. Rockwell's interest in presenting evidence of her husband's prior conduct." *Ibid.* In *Wynne*, however, the State's interest in preventing the admission of information about Mr. Peckham will not withstand the counterweight of the Sixth Amendment and the Due Process Clause. It would be unreasonable for the State to conclude that this interest outweighed Mr. Wynne's right to present evidence that Mr. Peckham was the actual murderer.

Moreover, the state courts' decisions also are "contrary to" clearly established federal law. When the Michigan courts excluded the evidence on state law grounds, they applied Michigan law in a manner that is inconsistent with federal law. It is clearly established that state evidentiary rules must yield to constitutional rights and that state courts must balance the interests of the rule against the interests of the defendant. The state courts failed to do that in this case. The state court decisions therefore are contrary to federal law.

Nor does the case of *Varner v. Stovall*, 500 F.3d 491 (6th Cir. 2007), require a different result. In that case, the petitioner was convicted of assault with attempt to murder her boyfriend when she hired another man, who shot the victim for her. Prior to the trial, the state trial court ruled that the petitioner could not present a defense of self-defense or any evidence of battered woman syndrome to support this defense. The court reasoned that, because the petitioner had used a third-party to commit the acts, she

was not entitled to rely on self-defense or battered woman syndrome. The Michigan Court of Appeals affirmed, citing state-law precedent and holding that "rationale behind self-defense or mitigating circumstances does not apply to a gun-for-hire situation such as occurred here." *People v. Varner*, 2002 WL 741531, at *1 (Mich. App. April 23, 2002).

The Sixth Circuit agreed with the district court that the petitioner was not entitled to habeas relief, first noting that "[a]ny right to present a theory of self-defense requires at a minimum that the theory be 'supported by the evidence.'" *Varner*, 500 F.3d at 499 (quoting *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002)). "'[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials' so long as the rules do not 'infring[e] upon a weighty interest of the accused' and are not 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Ibid.* (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (alterations in original)).

The court found that the petitioner simply had not alleged facts that would fall within the definition of self-defense or provocation under Michigan law, since under state law a self-defense theory requires proof of a belief that the defendant's life is in "imminent danger." *Ibid.* (quoting *People v. Heflin*, 434 Mich. 482, 500-01, 456 N.W.2d 10, 18 (1990)). The Court observed that hiring a contract killer is not consistent with being faced with imminent danger. The Court then concluded that "the confinement of

self-defense instructions to cases of 'imminent danger' does not unreasonably apply Supreme Court precedent, and neither does the state courts' conclusion that a scheme to hire a contract killer does not involve such an imminent danger." *Id.* at 500.

The court further reasoned that because the Michigan courts were permitted to limit the petitioner's ability to raise a provocation defense, a theory of provocation was not "material to the dispute" because "hiring a contract killer . . . [was not an] 'act out of passion'" based on an event that would "cause a reasonable person to lose control," as required under Michigan law. *Ibid.* (quoting *People v. Sullivan*, 231 Mich. App. 510, 517, 586 N.W.2d 578, 582 (1998) (internal quotations omitted)). The Court noted, "Whether it is a question of self-defense or a question of provocation, Varner fails to explain why an individual who faces a nonimminent threat is not just as capable of calling the authorities as of hiring a contract killer." *Ibid.* "Allowing the state courts to define the scope of provocation in this way was not 'arbitrary or disproportionate,' did not 'infringe [] upon a weighty interest of the accused,' and did not violate a right that is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Ibid.* (quoting *Scheffer*, 523 U.S. at 308 (internal citations omitted) and *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)).

None of these factors come into play here. The petitioner's defense at trial was the well-established plea that someone else committed the murder. The

State has no interest in limiting the proof of such a proposition, especially when the defense theory pointed to the State's main witness. The factors that rendered the balance of interests close in *Rockwell* and vitiated state policy reflected in the State's definition of self-defense in *Varner* are absent here.

The mistakes in the petitioner's initial briefing are serious. But the only material misstatement is the representation that Mark Peckham's oblique confession post-dated Mr. Timmerman's murder. Exclusion of that evidence alone likely would not have a substantial and injurious effect on the jury's verdict. However, the removal of that potential evidence from the equation does not alter the Court's conclusion that the state court's failure to allow the other excluded evidence was contrary to and an unreasonable application of federal law as clearly established by the Supreme Court.

III.

Except as modified herein, the Court adheres to its earlier opinion conditionally granting the writ of habeas corpus.

Accordingly, it is **ORDERED** that the orders staying the judgment granting a conditional writ of habeas corpus [dkt. #33, 34] are **VACATED**.

s/ David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: January 23, 2009

[Proof Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SCOTT WYNNE,

Petitioner,

v.

PAUL RENICO,

Respondent. /

Case No. 01-10247-BC
Honorable David M. Lawson

OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Scott Wynne is presently confined at the St. Louis Correctional Facility in St. Louis, Michigan on a state court judgment of sentence for first-degree murder, Mich. Comp. Laws § 750.316, and possession of a firearm in the commission of a felony, Mich. Comp. Laws § 750.227b. He has filed a petition for writ of habeas corpus through his attorney, alleging that he did not receive a fair trial for a number of reasons, including the state court's refusal to permit him to present evidence that he was innocent of the crime and that his chief accuser was likely the actual perpetrator. For the reasons explained in detail below, this Court is convinced that the petitioner's constitutional rights under the Due Process Clause and the Sixth Amendment were abridged, and that the state courts' conclusions otherwise constituted an unreasonable application of clearly established

federal constitutional law as determined by the Supreme Court. This Court, therefore, will conditionally grant the writ of habeas corpus pursuant to 28 U.S.C. § 2254, and direct the respondent either to release the petitioner from custody or to conduct a new trial within ninety days.

I.

Philip Timmerman was shot to death on his Allegan County, Michigan farm on the evening of May 18, 1995, between 10:22 p.m. and 10:37 p.m. There were no eyewitnesses to the crime. Scott Wynne, the petitioner in this case, was charged with the shooting and, following a jury trial in the Allegan County Circuit Court held from October 16 through November 3, 1995, was found guilty of first-degree murder and possession of a firearm while in the commission of that felony.

Timmerman farmed on land that he had leased, with a purchase option, from the Wynne family. The land had been in the Wynne family for many years, and the petitioner had on several occasions attempted without success to renegotiate the lease and option with Timmerman. In fact, the petitioner wanted to purchase the land himself. The prosecution's theory was that the petitioner's frustration with his unsuccessful dealings with Timmerman over the Wynne ancestral land caused Wynne to murder Timmerman in cold blood. Much of the prosecution's evidence of motive came from Mark Peckham, a childhood friend

of the petitioner. However, Wynne contended that Peckham's mental state had deteriorated since high school and he had become a destructive and violent person, who was jealous of the petitioner and sought revenge against him for real or imagined wrongs. Wynne argued that Peckham set out to frame him for Timmerman's murder.

Although Wynne presented some evidence establishing this defense at trial, the jury never heard some of the powerful testimony in support of the defense theory because of the state courts' evidentiary rulings. The police neglected to pursue leads that were consistent with that defense or pointed to a suspect other than the petitioner, and even failed to disclose certain evidence to Wynne's trial counsel. The prosecution's case against Wynne, although constitutionally sufficient, was entirely circumstantial.

Timmerman was shot and killed near his fertilizer truck, which was parked near a barn, while farming his land on the night of May 18, 1995. There were no eyewitnesses to the shooting. However, two farmhands, Brent DeWeerdt and Keith Kohtz, were helping Timmerman plant corn on the night of May 18th. Around 10:00 p.m., Kohtz saw what could have been a flashlight or a parking light on a vehicle near a railroad grade in the area of the tree line which was adjacent to Timmerman's field.

DeWeerdt and Timmerman had taken a semi truck from the farm where the murder occurred to another site around 10:00 p.m. and did not return

until close to 10:30 p.m. DeWeerdt indicated that he spoke with his parents from a phone in the barn of the other farm at 10:15 p.m. and that it took between five and ten minutes after that phone call to return to the farm where the murder took place. Upon returning to this first farm, DeWeerdt dropped Timmerman off and Timmerman went to fill some fertilizer tanks while DeWeerdt went to hook up a fertilizer wagon to a flatbed truck. While doing this, DeWeerdt heard five to ten noises which sounded like "pops." When DeWeerdt went looking for Timmerman, he found him lying next to his truck, which was spewing fertilizer. DeWeerdt contacted Kohtz, who was on a tractor in the field, by two-way radio. When Kohtz arrived, he called the 911 emergency telephone number to summon help.

An autopsy revealed that Timmerman had been shot nine times, eight times with .45 caliber bullets and once with a .22 caliber bullet. The petitioner was quickly considered a suspect when Deputy Lon Hoyer of the Allegan County Sheriff Department, who was working the homicide scene, informed Lieutenant Ross of the sheriff's department that they should investigate the petitioner as a suspect. Hoyer informed Ross that he was aware of problems between the Timmermans and the petitioner and that the petitioner had been a suspect in a prior tire slashing of the victim's farm equipment. Scene measurements that were taken indicated that the direct distance from the homicide scene to the petitioner's house was 1.53 miles. Two sets of footprints were found in the

field at the murder scene, and a K-9 dog tracked a human scent to a grassy area on the side of Timmerman's field where the grass was matted down. The K-9 dog showed a great deal of interest in the area and then continued tracking the scent to an abandoned railroad grade and back down towards 118th Avenue where more footprints were observed. The dog continued tracking up the railroad grade to 28th Street to the gravel road, where it lost track of the scent at the intersection of the railroad grade and 28th Street. A cast was made of a footprint found at the railroad grade.

Detective Patrick O'Reilly of the Allegan County Sheriff's Department was also involved in the investigation of the murder. O'Reilly became aware of the petitioner being a possible suspect through conversations with Deputy Hoyer and Sergeant Dale Haverdink. O'Reilly was aware that the victim had been shot with a .45 caliber weapon, and learned through his investigation that the petitioner had a .45 caliber handgun registered to him. O'Reilly then obtained a search warrant for the petitioner's residence. During the execution of the search warrant, police recovered a .45 caliber handgun in a holster with an additional magazine and clip from over a ceiling tile in the petitioner's bedroom. This handgun was, in fact, registered to the petitioner. The petitioner denied putting the handgun in the ceiling and informed the officers that he had last seen it on his bedpost. Tests were performed on this handgun by police and it was determined that it was one of the

weapons used to murder Timmerman. Tests also indicated that a fingerprint found on the holster and magazine pouch of the handgun belonged to the petitioner. There was also testimony concerning the police investigation into the slashing of the victim's tractor tires in 1992. During that investigation, police had spoken to the petitioner, but he had denied any involvement with this vandalism of the victim's property.

Deputy Kenneth Blackwell, who had collected evidence, testified that neither the cast of the footprint taken from the railroad grade nor the footprints found at the crime scene matched any shoes that had been taken from the petitioner's home during searches conducted by the police on May 19 and 24, 1995. In addition, the petitioner's clothes, shoes, and the mats from his vehicles were submitted for testing against soil samples taken from Timmerman's farm, but revealed no traces of fertilizer or herbicides that had been used on Timmerman's farm on the night of the murder.

Mark Peckham, a friend of the petitioner's since childhood, contacted the police two days after the shooting. Peckham claimed that the petitioner had told him that he had wanted to kill Timmerman. The petitioner had told Peckham that he and his mother had met with Timmerman in an attempt to get him to release back to them the land that he had leased from the Wynne family, with no success. According to Peckham, the disagreement over the land was a continual problem for the petitioner and he saw the

petitioner become more and more upset over the issue. In December of 1992, the petitioner told Peckham that he had slashed the victim's tractor tires. The petitioner began to talk frequently about wanting to kill the victim in September or October of 1993. The petitioner told Peckham that he was running from the industrial park in Allegan to his house to see how long it would take and further spoke with Peckham about various ways to kill the victim. However, none of the methods that the petitioner mentioned when he discussed killing Timmerman were the way that Timmerman was murdered. Peckham, in fact, conceded that the petitioner had told him that he would not kill Timmerman on his family's property.

Peckham admitted that he had fired the petitioner's guns on numerous occasions and was also aware that the petitioner kept his .45 caliber handgun on his bedpost. Peckham acknowledged that he had worn some camouflage clothing that belonged to the petitioner's sister, September Wynne, while playing paintball the Sunday before the killing. Peckham admitted being at the petitioner's home on the afternoon of the murder, while waiting for the petitioner to come home. No one else was at the petitioner's house while Peckham waited for him. During this time, one of the petitioner's friends and neighbors, Mark Craig Haveman, stopped and talked with Peckham. Peckham finally left the house, but saw the petitioner on the road, spoke to him, and returned to the petitioner's home to wait for him again. Peckham denied going into the house at any time while waiting.

Although denying that he killed Timmerman, Peckham testified that if he were to have committed the murder himself he would have worn camouflage clothing and lain in wait.

Peckham testified that the petitioner called him at 9:20 p.m. on the night of the murder and talked for five to seven minutes. However, on cross-examination, Peckham acknowledged that the petitioner's phone call on the night of the murder had been from 10:05 to 10:12 p.m. and that Peckham had left for work shortly after the telephone call.

On cross-examination, Peckham admitted that he described himself as a passive-aggressive person, i.e., someone who would hold his anger in until he acted it out in some indirect way. Peckham denied owning an unregistered 9 millimeter pistol. He denied making the complaint that he worked harder than the petitioner or that the petitioner got more than he deserved or took from his family but gave nothing in return. Inexplicably, Peckham believed that the petitioner had gotten his telephone service cut off after the petitioner stopped calling him with work. Peckham admitted that he knew the access code for the lock to the petitioner's shop and had gone there in March to retrieve his .22 rifle when the petitioner was not home.

Peckham denied telling his insurance agent, Mike Densham, that he was "going to put Scott Wynne away." He further denied that he had made comments to Kathy Hinson, with whom he had

worked and who was a chaplain at the county jail, that he had done something so wrong that if the police ever found out he would go to prison for life, or that hunting men was more fun than hunting animals. Peckham claimed that he left for work at 10:30 p.m. on the night of the murder and arrived at 10:50 p.m. Peckham's place of work was in a local industrial park just southwest of 118th Avenue along the abandoned railroad grade and was closer to the murder scene than was the petitioner's home.

Defense counsel attempted to question Peckham about his former girlfriend, Melissa Weeks (Hill). The prosecutor objected to this line of questioning. Outside of the jury's presence, defense counsel made an offer of proof regarding additional facts about Peckham. These included the fact that Peckham had admitted burning down his trailer that he and Weeks shared as revenge on the day she broke up with him, that Peckham had showed Weeks an unregistered 9 millimeter pistol and threatened to kill her if she told anyone about it, that Peckham had vandalized his own truck and attempted to frame Weeks' new boyfriend for the crime, and that he had sought to enlist a friend to beat or kill his stepfather out of revenge. The trial court ruled that this was inadmissible character evidence and was more prejudicial than probative.

Elizabeth Carns testified that she was a friend of the petitioner and had dated him at one time. The petitioner had told Carns about the dispute that he was having with Timmerman over his mother's land.

The petitioner had informed Carns that he was angry with the victim and had tried to get him to change the paperwork for the land. Carns also testified that the petitioner had admitted slashing the victim's tractor tires in 1992.

Mark Craig Havemen [sic] testified that he went to the petitioner's home in the late afternoon hours of May 18, 1995 and discovered Peckham there alone. Haveman spoke with Peckham briefly and then left. Haveman testified that the garage doors to the petitioner's house were open. Havemen [sic] saw the petitioner the day after the shooting, but the petitioner mentioned nothing about Timmerman. In fact, Haveman testified that the petitioner had recently paid him to move brush piles with a bulldozer off of the land leased by Timmerman so that Timmerman could plant crops near the lot line more easily. Haveman testified that in his opinion, the petitioner was honest and nonviolent.

Christina Haveman, Mark Craig Haveman's daughter-in-law, said that on the night of the murder, she and her husband left to visit her father-in-law at 10:10 p.m. and arrived at his house at 10:30 p.m. She observed a tractor in the fields where Timmerman had been working. When she and her husband left to go home at 11:00 p.m., she saw the petitioner's truck at his house and his bedroom light on. Either on the way to her father-in-law's house at 10:20 p.m. or on the way back at 10:55 p.m., she observed car or truck reflectors down the railroad grade from 28th Street in the direction of the murder scene.

Mark Andrew Haveman's testimony mirrored that of his wife Christina. However, he testified that he observed tail lights from a car or a truck on the abandoned railroad grade at 10:20 p.m., when he and his wife were en route to his father's house. When he passed the petitioner's house both times on the night in question, at 10:20 p.m. and 10:55 p.m., the petitioner's truck and van were parked there.

Prior to and during the trial, the petitioner's mother, Judy Wynne, and her daughter September, had experienced several unusual occurrences, including prowlers in the middle of the night. At the end of the first day of trial, on October 16, 1995, they returned home to find their door wide open. Because they found nothing missing, they did not call the police, but contacted the petitioner's attorney. Defense counsel sent two investigators to check the Wynne home on October 23, 1995. The investigators found a blue duffle bag lying beneath the bed in an unoccupied upstairs bedroom. Inside of the duffel bag they discovered camouflage clothing and a pair of boots with soles similar to the footprints found at the crime scene. The bag also contained a military belt, a canteen, a knife, a tear gas cannister, a mirror, leather gloves, socks, hat, loose ammunition, and a camouflage face painting kit. This bedroom previously had been searched by the police twice and nothing had been found there, nor had one of the defense investigators, Patrick Parr, seen the bag when he went through the house on June 23, 1995.

The duffel bag and its contents were turned over to defense counsel, who in turn, contacted the Allegan County Prosecutor's Office. The bag was ultimately taken into custody by Sergeant Dean Kapenga of the Allegan County Sheriff's Department and taken to the Michigan State Police Laboratory for testing of the contents. Testing revealed that the petitioner's fingerprint was taken from the tear gas cannister that had been found inside of the duffel bag. An expert in footprint evidence compared the boots found inside the bag with the footprints found at the crime scene and determined that the left boot matched the cast of the footwear impression taken from the crime scene.

On October 30, 1995, the petitioner's counsel filed a motion to dismiss due to the intimidation of witnesses by the police. In this motion, counsel indicated that after he had turned over the duffel bag to the police, Detective Kapenga had threatened defense counsel, the defense investigators, and defense witnesses with being charged criminally as accessories after the fact to murder for planting evidence in order to influence or affect the verdict. In an affidavit attached to the motion, defense counsel stated that the threat of criminal prosecution had affected his ability to effectively represent the petitioner by making him think that he was going to be charged with a crime himself. Counsel sought to have a mistrial declared or the charges dismissed. The trial court denied the motion.

Norma Kawka, the petitioner's girlfriend, testified that the petitioner had spoken with his attorney about changing the lease that the victim had on the land. On the evening of the murder, Kawka went to the petitioner's house and spoke with him. They did not discuss Timmerman. Kawka left at 10:00 p.m. and the petitioner called her at 10:50 p.m. When she called the petitioner the next morning and informed him that the victim was dead, the petitioner was surprised and answered "you're kidding." Kawka was later recalled by the defense and testified that she spoke to the petitioner on May 20, 1995, after the shooting, and told him the details of what she knew about Timmerman's murder. She also testified about the petitioner's whereabouts for the evening in question, as well as the fact that his trucks were at home at the time of the killing. Kawka testified that when she left the petitioner at 10:00 p.m., he was happy and they were making plans for dinner for the following day.

The petitioner's mother, Judy Wynne, testified both in the prosecution's case-in-chief and for the defense. Ms. Wynne testified that Timmerman's lease on the land had been renegotiated in 1992 and that her children had been given a five-year first option to purchase the land from her. Ms. Wynne testified that neither she nor the petitioner had been angry at Timmerman regarding the renegotiation of the option on the lease.

On the day of the murder, Judy Wynne arrived home at 5:45 p.m. The petitioner was speaking with

Mark Haveman when she arrived home. The petitioner left home that evening around 8:00 p.m. and his girlfriend Norma Kawka arrived at the home shortly thereafter. Judy Wynne was positive that the petitioner came into the house to take a shower at 10:30 p.m., because her cuckoo clock struck the time.

Stephen Stein, Sr., a neighbor of Timmerman, testified that he heard gunshots on May 18, 1995 about 10:15 to 10:20 p.m. Shortly thereafter, Stein observed fire trucks outside and went toward the Timmerman farm, where his children, nephew, and wife had already gone. As he walked towards the scene, he observed a man, who was not the petitioner, walking west down 118th Avenue, in the opposite direction from the petitioner's house. The man was 6'2" tall, thin, wearing a T-shirt and jeans, with messy hair. Stein thought the man might be his son and yelled over to him, but the man turned and Stein realized that it was not his son. The man looked at Stein, appeared startled, and continued walking. Stein thought it was unusual for a person to be walking on foot on a rural road at night. Stein had also seen a white pickup truck in the area around that time.

Matthew Radke had been a good friend of Peckham since high school until 1992, but was no longer his friend due to Peckham's "mental deterioration." The prosecutor objected to this testimony and Radke was only able to testify to the jury that Peckham was untrustworthy. Outside the jury's presence, a separate record was made of Radke's additional testimony

that the petitioner sought to have admitted. Radke testified in this separate record that Peckham had vandalized his own truck and had initially blamed someone else, but later admitted that he did it himself and had the repairs paid by his own insurance. Radke said that Peckham talked about avoiding the debts caused by the vandalism of his truck and the arson of his trailer by going into bankruptcy. Peckham admitted to Radke that he had beaten his girlfriend. Peckham once asked Radke if he thought the two men could "take" his stepfather, because he had a grudge against him. Prior to the vandalism of his own truck, Peckham had attempted suicide and when Radke visited him in the hospital, he talked strangely and began to decline mentally after that. Peckham had described himself to Radke as "passive-aggressive" with a penchant for violence and getting revenge in secretive ways. None of this additional testimony was admitted into evidence.

The defense also made a separate record of the proposed testimony of Melissa Hill, Peckham's ex-girlfriend. Melissa Hill had dated and lived with Peckham for five years. Peckham had been violent to her and had vandalized his own truck and had tried to blame her new boyfriend for this act. Peckham had showed her what he claimed was an unregistered handgun, and threatened to kill her with it more than once if she told her family that he possessed it. Peckham would sometimes drive at a high rate of speed and ask her how she felt about dying right then. Hill testified that Peckham's trailer was burned down

within twenty-four hours of their break-up and Peckham later admitted that he had committed the arson.

Hill testified further that Peckham was a stalker and burglar with a fetish for stealing women's undergarments. Hill testified that Peckham would use a key obtained from his brother, an apartment complex manager, to break into female tenants' apartments and steal their underwear. Peckham also stole underwear from Hill's girlfriends. Peckham kept a large collection of stolen women's underwear, a list of the names and addresses of the women from whom it was stolen, and the names of those women whose underwear he wanted but had not yet stolen. Defense counsel argued that this fetish was particularly relevant, first, because it established Peckham's readiness to go into persons' homes, and secondly, because a women's petite, black camisole, which did not belong to the Wynnes, had been found underneath the blue duffel bag that had been found in the Wynne household on October 23, 1995.

The petitioner argued that Peckham's stalker and burglar behavior, his character for seeking revenge in secretive ways, his violent tendencies, his mental deterioration, and his readiness to frame other persons supported an inference that he was capable of murdering Timmerman and planting the petitioner's gun afterwards to frame the petitioner for the murder as a means of obtaining revenge against the petitioner. The court excluded this testimony on the grounds that it was not relevant, was more

prejudicial than probative, and there was no evidence that Peckham planted the duffel bag. Defense counsel also made an offer of proof concerning Kathy Hinson's testimony, namely, that Peckham had admitted to her that he had done something so bad that if the police ever found out, he would be put in jail for life, and that it was more fun to hunt men than animals. The court excluded this testimony on the grounds that it was more prejudicial than probative, finding that although Peckham was an important witness, he was not the crucial witness.

Thomas Cole, a defense investigator, testified that he had spoken with Peckham. Peckham told Cole that the petitioner had too easy of a life and had taken from Peckham's family but had not returned anything to them. Cole also testified that there were burrs in the socks found in the duffel bag that were similar to burrs found near the barn where Timmerman's body had been found.

Michael Densham, Peckham's insurance agent, testified that on three or four occasions following Timmerman's murder, Peckham told Densham that he was "going to put Scott Wynne away."

The petitioner testified in his own defense. He was a twenty-six-year-old, self-employed businessman who owned a garage door company that had grossed $197,000 in 1994. The petitioner also owned various rental houses and an apartment building and also worked in the construction and rehabilitation of houses. The petitioner was a licensed builder who had

completed 2000 hours towards a journeyman electrical license.

The petitioner testified that on the day of the murder, he came home from work around 5:30 p.m. and spoke with Mark Havemen [sic] for one and a half hours before running an errand at 8:00 p.m. The petitioner returned home at 8:30 p.m., where Kawka was waiting for him. Kawka left the house at 10:00 p.m. and the petitioner worked on business invoices before going into the house at 10:25 p.m. The petitioner took a shower and called Kawka at 10:50 p.m. On Saturday, May 20, 1995, the petitioner spoke with Kawka and was shocked when he was informed by her that Timmerman had been murdered.

The petitioner denied ever telling Peckham that he planned on killing Timmerman. Although he acknowledged that he thought his mother had set too low of a price for the land that she had leased to Timmerman, he thought it was only $20,000 too low. The petitioner was aware that he had an option to purchase the land. Although it was not part of his plans, had he wanted to purchase the land, his maternal grandfather was wealthy and would have assisted him with financing it.

The petitioner testified that the boots and the other items found in the duffel bag were not his, although some of the camouflage clothing had belonged to his sister from when she was in the army and he had previously given a tear gas cannister like

the one found in the bag to Peckham after playing paintball on the Sunday prior to the murder.

The jury found the petitioner guilty of first-degree murder and felony firearm, and he was sentenced to life in prison without parole on the murder charge and two years imprisonment on the felony firearm count on January 5, 1996. He filed a timely motion for new trial, raising several grounds, including a claim that newly discovered evidence required a new trial. The trial court conducted a lengthy evidentiary hearing, and denied the motion in an opinion and order dated August 13, 1998. The petitioner timely pursued an appeal in the Michigan Court of Appeals, raising, *inter alia,* all of the issues that he presents to this Court. The court of appeals rejected the petitioner's arguments, for reasons discussed in detail below, and affirmed his conviction in an unpublished opinion. *See People v. Wynne,* No. 192512, 1999 WL 33328893 (Mich. Ct. App. Dec. 3, 1999). The state supreme court denied the petitioner's application for leave to appeal. *See People v. Wynne,* 463 Mich. 875, 618 N.W.2d 595 (2000).

On June 15, 2001, the petitioner filed the present petition for writ of habeas corpus, raising the following grounds:

> I. The petitioner was denied the right to present a defense where the trial court excluded defense evidence that he was framed by the key prosecution witness who may have committed the murder.

> II. Where testimony from witnesses who lived close to the scene suggested a different killer or killers was not presented at trial, the petitioner was deprived of due process, either because the prosecutor withheld information [that] should have been turned over to the defense, or because the petitioner was deprived of effective assistance of counsel.
>
> III. The petitioner was deprived of his rights to due process and to counsel because the prosecutor intimidated defense counsel and defense witnesses during trial by threatening to bring criminal charges against them.
>
> IV. The petitioner was deprived of a full and fair opportunity to litigate [a] Fourth Amendment issue regarding the May 19, 1995, search warrant, because the record does not support the state court factual findings, and on the merits the search warrant affidavit contained false information made in reckless disregard for the truth and misleading and material omissions, and did not establish probable cause.
>
> V. The petitioner was denied his state and federal due process rights to a fair trial where the trial court merely instructed the jury that a reasonable doubt is a doubt that is reasonable even after the prosecutor denigrated the reasonable doubt standard.

The respondent filed an answer challenging the merits of the petition, together with the Rule 5 materials, on

November 28, 2001. The respondent has not raised any substantial procedural defenses, but rather contends that the petitioner is not entitled to relief under 28 U.S.C. § 2254(d), as that statute has been amended by the Antiterrorism and Effective Death Penalty Act of 1996.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the Act, April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Because the petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis,* 144 F.3d 429, 433 (6th Cir. 1998). Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins v. Smith,* ___ U.S. ___, 123 S. Ct. 2527, 2535 (2003) (quoting *Williams v. Taylor,* 529 U.S. 362, 409 (2000); internal quotes omitted). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also Cremeans v. Chapleau,* 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous.").

The United States Supreme Court has explained the proper construction of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams, 529 U.S. at 405-06.

The Supreme Court held that a federal court should invoke the "unreasonable application" clause of § 2254(d)(1) and issue the writ "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply

> because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409, 410, 411. *See also Lewis v. Wilkinson,* 307 F.3d 413, 418 (6th Cir. 2002).

With these standards in mind, the Court proceeds to the merits of the petition.

A.

The petitioner's theory at trial was that prosecution witness Mark Peckham was not only the actual murderer, but also that Peckham had planted and manipulated evidence to make it appear that the petitioner killed Philip Timmerman. The petitioner theorized that Peckham sought revenge against him for real or imagined wrongs, and that Peckham killed Timmerman in a way that implicated the petitioner in the crime. According to the petitioner, Peckham achieved this goal by taking the petitioner's .45 caliber handgun from the petitioner's home, shooting Timmerman, and then returning the weapon, hiding it above the ceiling tiles back at the petitioner's house. In addition, the petitioner believed that Peckham had planted a duffle full of evidence, including shoes and other clothing linked to the murder scene, in the petitioner's home while the trial was ongoing.

The petitioner sought to prove this theory at trial by offering evidence that Peckham previously had

engaged in a similar modus operandi when he took revenge on his girlfriend, Melissa Weeks (Hill), after she broke up with him. The petitioner sought to prove that Peckham had burned down a trailer that he shared with his girlfriend Melissa Weeks (Hill) in an act of revenge and then vandalized his own truck and had attempted to blame it on Weeks' new boyfriend. Additional evidence of Peckham's scheme of exacting revenge on other occasions, excluded by the trial court, consisted of testimony that Peckham had been violent towards Weeks, and testimony from Matthew Radke that Peckham had admitted that he had a passive-aggressive personality, had a penchant for violence, and sought revenge in secretive ways. To support the theory that Peckham had planted the duffle in the petitioner's house during the trial, the petitioner offered evidence that Peckham had burglarized homes for the purpose of stealing women's undergarments, which he collected, inasmuch as a "signature" camisole, belonging neither to the defendant's mother nor sister, was discovered with the blue duffle full of evidence in a location that previously had been searched on more than one occasion by both police and defense investigators. Finally, the petitioner sought to introduce evidence of an oblique admission by Peckham through the testimony of Kathy Hinson, to whom Peckham allegedly said that he had done something so bad that if the police ever found out, he would be put in jail for life, and that it was more fun to hunt men than animals.

This evidence, coupled with other admitted testimony that established that Peckham had the means and opportunity to commit the homicide with the petitioner's handgun, paints a convincing picture of the petitioner's innocence and Peckham's guilt. The jury, however, was not able to assess these submissions, or evaluate the entire spectrum of evidence offered in support of the defense theory.

The respondent contends that this claim consists of nothing more than state law evidentiary questions, and points to the state court of appeals' opinion, which decided the issue based on its view of the Michigan Rules of Evidence. The ruling on this issue is contained in a single paragraph:

> Defendant next argues that he was denied the right to impeach prosecution witness, Mark Peckham, and demonstrate that Peckham had committed the murder. We disagree. Defendant offered evidence in the form of testimony of other "witnesses" concerning various things Peckham had said or done in the past. Testimony regarding Peckham's past violence and criminal acts, offered to prove that he acted in conformity therewith, constituted improper impeachment under MRE 404(b). Testimony regarding his sexual proclivities was inadmissible because it was unrelated to truthfulness. *People v. Chaplin*, 412 Mich. 219, 225-226, 313 N.W.2d 899 (1981). Testimony offered to contradict Peckham's testimony was inadmissible because a proper foundation for impeachment did not

> occur, *People v. Barnett,* 165 Mich. App 311, 315, 418 N.W.2d 445 (1987), and it constituted impeachment by extrinsic evidence on a collateral matter. *People v. Sutherland,* 149 Mich. App 161, 165-166, 385 N.W.2d 637 (1985). Testimony regarding Peckham's history of mental illness was inadmissible because defendant failed to establish that the information was temporally relevant, that is, that any mental illness was suffered by Peckham and affected his memory, ability to perceive reality, or tell the truth. *United States v. Jackson,* 863 F. Supp. 1462, 1465 (D. Kan. 1994).

People v. Wynne, 1999 WL 33328893 at *1.

To be sure, errors in state evidence law will not support the issuance of the writ unless those errors rendered the trial fundamentally unfair. *See Clemmons v. Sowders,* 34 F.3d 352, 357 (6th Cir. 1994) (holding that "[h]abeas review does not encompass state court rulings on the admission of evidence unless there is a constitutional violation"). The Court of Appeals for the Sixth Circuit has explained that

> "[e]rrors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding." *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988). Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they "offend[ ] some principle of justice so rooted in the

> traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhof,* 518 U.S. 37, 43 (1996) (quoting *Patterson v. New York,* 432 U.S. 197, 202 (1977)); *see also Spencer v. Texas,* 385 U.S. 554, 563-64 (1967).

Seymour v. Walker, 224 F.3d 542, 552 (6th Cir. 2000), *cert. denied,* 532 U.S. 989 (2001) (second alteration in original). However, this Court finds that the petitioner has raised an issue of constitutional dimension that was neither properly addressed nor correctly decided by the state courts: the right to present a defense incorporated in the Sixth Amendment.

The failure of the state court of appeals to directly address the petitioner's constitutional claim implicates the standard of review that this Court must apply. The Sixth Circuit has recently observed that "[w]here . . . the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under the AEDPA does not apply." *Maples v. Stegall,* ___ F.3d ___, No. 01-2727, 2003 WL 21960685, at * 3 (6th Cir., Aug. 19, 2003). The court took its cue on this issue from *Wiggins v. Smith,* ___ U.S. ___, 123 S. Ct. 2527 (2003), where the Supreme Court considered an ineffective assistance of counsel claim on habeas review in which the state court had never analyzed the prejudice prong of the applicable test. Under those circumstances, the *Wiggins* Court concluded that its "review [wa]s not circumscribed by a state court conclusion," *Id.* at 2542, and instead conducted a *de novo* review. Nonetheless, this Court

finds that the petitioner prevails on this issue under the more stringent standards of the AEDPA, and will assess the claim by that standard.

The Compulsory Process Clause of the Sixth Amendment provides an accused with the right to "compulsory process for obtaining witnesses in his favor," U.S. Const. amend VI, a crucial part of the Constitution's more basic guarantee of "a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). As applied to the States by the Due Process Clause of the Fourteenth Amendment, the accused has the right at trial to present testimony that is "relevant," "material," and "vital to the defense." *Washington v. Texas,* 388 U.S. 14, 16 (1967). *See also Crane v. Kentucky,* 476 U.S. 683, 690 (1986) ("whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'") (internal citations omitted). The "right to present relevant evidence is not unlimited," and "is subject to reasonable restrictions" imposed by the criminal process. *United States v. Scheffer,* 523 U.S. 303, 308 (1998).

> As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate

> to the purposes they are designed to serve." Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

Ibid (citations and quotation omitted).

In *Washington v. Texas,* the petitioner was convicted of malicious murder arising from the shooting of the mother of his ex-girlfriend. Both Washington and one Charles Fuller were present when the gun was fired. Washington testified at his trial that he did not shoot the deceased, and had in fact been running back to his vehicle when he heard a shot ring out, presumably discharged by Fuller. Fuller was not allowed to corroborate this version of events at trial because he had earlier been convicted of the same murder, and under Texas evidence law persons charged as accomplices in the same crime were not permitted to testify on behalf of one another. The petitioner's conviction was upheld by the Texas courts, but the Supreme Court reversed, finding that "the right to present . . . witnesses to establish a defense . . . is a fundamental element of due process of law." *See* 388 U.S. at 19. The Court found the Texas rule in question – which prohibited the accomplice from testifying for his co-participant, but not the prosecution – to be "absurd" and "arbitrary," ruling that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23.

A similar problem arose in *Chambers v. Mississippi,* 410 U.S. 284 (1973), where the defendant was tried for the murder of a police officer. The defendant was accused after evidence established that the slain deputy had discharged his firearm at his likely assailant and that Chambers had been struck by one of the bullets. Chambers insisted that he was innocent, and demanded to call at trial a Gable McDonald, who initially confessed to the shooting to Chambers's attorneys, but later recanted at a preliminary examination. At trial, Chambers sought to prove not only that he did not shoot the officer, but that McDonald did. Although he was able to present testimony that McDonald was in fact the shooter, he was not able to call McDonald to the stand himself because of Mississippi's common-law "voucher" rule, which provided that a party could not impeach his own witness. Furthermore, the trial court refused to permit Chambers to call three witnesses who would have testified that McDonald confessed to them as well because Mississippi did not recognize a hearsay exception for statements against penal interest.

The Supreme Court concluded that Chambers' inability to call and cross-examine McDonald, combined with the trial court's prohibition on the introduction of the witnesses' hearsay testimony, violated Chambers' due process rights. With regard to the requested testimony of McDonald, the Court recognized that "the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial

process." *Id.* at 295. As an example of such an interest, the Court cited to *Mancusi v. Stubbs,* 408 U.S. 204 (1972), in which the Court held that the trial court's inability to compel the attendance of a foreign national did not abridge the defendant's right under the Confrontation Clause. Nonetheless, the "denial or significant diminution" of this right "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers,* 410 U.S. at 295 (quoting *Berger v. California,* 393 U.S. 314 (1969)). Because "the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend" on who actually called the witness, the Supreme Court concluded that the voucher rule "plainly interfered with Chambers' right to defend against the State's charges." *Id.* at 298.

The Court found that it need not decide whether the Confrontation Clause violation itself would be enough to reverse the conviction, as Chambers had argued that it was the combination of his inability to cross-examine and his inability to call witnesses that violated his due process rights. *Ibid. See also Davis v. Jabe,* 824 F.2d 483, 486 (6th Cir. 1987), *cert. denied,* 484 U.S. 988 (1987). Proceeding to the exclusion of the three hearsay witnesses, the Court recognized the State's interest in prohibiting introduction of hearsay generally, but found that such a rule must yield to the defendant's due process interests when sufficient indicia of reliability underscore the statements allegedly made. *Chambers,* 410 U.S. at 302 (noting that

because "[t]hat testimony was also critical to Chambers' defense, . . . the hearsay rule may not be applied mechanistically to defeat the ends of justice"). The reliability of the statements was supported by their spontaneity to close acquaintances, their corroboration by other evidence, and the reality that the statements were manifestly against McDonald's penal interest. *Id.* at 300-01. Together "with the State's refusal to permit Chambers to cross-examine McDonald," "the exclusion of this critical evidence" denied Chambers due process of law. *Id.* at 302. *See also Crane v. Kentucky,* 476 U.S. 683, 689-91 (1986) (holding that the State deprived the defendant of his right to due process by denying him the opportunity to present evidence at trial concerning the voluntariness of his confession on the basis of a state rule permitting such evidence only to be introduced at pretrial hearings).

In *Rock v. Arkansas,* 483 U.S. 44 (1987), the Supreme Court explained that the defendant's right to present a defense at trial trumped not only "arbitrary" state procedural rules, but also those "disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 56. In *Rock,* the Court addressed an Arkansas rule of evidence that categorically excluded testimony that was derived from hypnosis sessions. Applying the rule, the trial judge had forbidden the defendant from providing any testimony

other than that which she had recalled prior to her hypnosis sessions. Although it recognized that several other states applied a similar rule, the Court found that the effect of the rule was to "prevent[ ] her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses." *Id.* at 57. In light of the evidence corroborating the details of the defendant's hypnotically refreshed testimony, the tape recordings of the hypnosis sessions, and the trial court's finding that the hypnotist did not use leading questions, the trial court erred by not weighing the defendant's right to present testimony against the interests advanced by the hypnosis rule. *Id.* at 61-62. Accordingly, the Court vacated the conviction and remanded the matter for further proceedings.

It is clear that the defendant's right to present evidence is not absolute, and that the State may place reasonable limitations on the introduction of evidence in criminal proceedings. *See, e.g., United States v. Scheffer,* 523 U.S. 303 (1998) (holding that the proscription against the introduction of polygraph examination results contained in Military Rule of Evidence 707 did not violate the Due Process Clause). However, the unavoidable conclusion to be drawn from the Supreme Court's cases is that the "the right to present . . . witnesses to establish a defense" is clearly established as "a fundamental element of due process of law." *See Washington,* 388 U.S. at 19. State evidence rules must yield to this fundamental right when they "plainly interfere[ ] with [the defendant's]

right to defend against the State's charges," *Chambers,* 410 U.S. at 298, particularly when such rules are "disproportionate to the purposes they are designed to serve." *Rock,* 483 U.S. at 56. A state court's interpretation of its evidence rules that results in the denial of the defendant's right to present a defense, most notably the defense of third-party culpability as in *Chambers,* especially when the state court interprets the evidence rules incorrectly, is an unreasonable application of this clearly established constitutional rule. *See Wade v. Mantello,* 333 F.3d 51, 58 (2d Cir. 2003) (holding that a claim that evidence of another's guilt was improperly excluded "is based upon clearly established federal law, as determined by the Supreme Court. The Constitution protects a criminal defendant from the arbitrary exclusion of material evidence, and evidence establishing third-party culpability is material.").

In the present case, the petitioner's attack against the prosecution witness was two-pronged: he sought both to discredit and accuse him. The petitioner also sought to undermine the probative force of the State's circumstantial evidence by linking it to Peckham's scheme to "frame" the petitioner. The state court of appeals, however, limited its view of the relevance of the petitioner's proffered evidence by considering it only as an attack on Peckham's "character." This narrow view resulted in an abridgement of the defendant's constitutional right to present a defense, as clearly established by the Supreme Court. Evidence that someone other than the defendant may

have committed the crime is critical exculpatory evidence that the defendant is entitled to present to the jury. *See United States v. Armstrong,* 621 F.2d 951, 953 (9th Cir. 1980) (citing *Chambers,* 410 U.S. at 302, and holding that "[f]undamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged."). This is particularly true in cases like this one, where there is evidence that suggests that the prosecution's main witness may be the actual perpetrator. Such evidence should be admitted even where the defense theory is purely speculative, since it is the jury's role to consider the evidence and determine whether it presents "legitimate alternative theories for how the crime occurred." *Gray v. Klauser,* 282 F.3d 633, 649 (9th Cir. 2002) (quoting *United States v. Vallejo,* 237 F.3d 1008, 1023 (9th Cir. 2001)).

Likewise, extrinsic proof tending to establish a reason on the part of a witness to fabricate is never collateral and may not be excluded on that ground. *Justice v. Hoke,* 90 F.3d 43, 48 (2d Cir. 1996) (granting habeas relief where such evidence was excluded). "[I]t is axiomatic that defense counsel should be permitted to expose to the jury facts relevant to a witness' possible motivation to testify favorably for the prosecution or his potential bias for or against any party to the criminal proceeding. Such information is 'always relevant as discrediting the witness

and affecting the weight of his testimony.'" *Wilkerson v. Cain,* 233 F.3d 886, 890 (5th Cir. 2000) (some internal quotation omitted).

In this case, the state court of appeals held that evidence of Peckham's conduct toward his former girlfriend and her new boyfriend, and the evidence of his theft of women's undergarments, was impermissible propensity evidence excludable under the first sentence of Michigan Rule of Evidence 404(b), which states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." It is clear from the record, however, that the evidence was not offered as proof of Peckham's character or a character trait. Rather, the defense intended to show Peckham's "system in doing an act," *see* Mich. R. Evid. 404(b), in the manner of seeking revenge upon the defendant by accusing him of a crime that Peckham, himself, committed. Likewise, proof that Peckham stole women's undergarments, to which he allegedly had a strange attachment, linked him to the incriminating evidence tied to the crime scene that the petitioner says was "planted" at his home during the trial. Thus, according to state evidence law, since the chain of inferences that made this evidence relevant did not require a detour through Peckham's character, the first sentence of Rule 404(b) should not have served as an obstacle to admissibility. *See People v. Vandervliet,* 444 Mich. 52, 64, 508 N.W.2d 114, 121 (1993) (holding that "if the proffered other acts evidence is logically relevant, and does not involve the

intermediate inference of character, Rule 404(b) is not implicated").

Moreover, Peckham's statements to Kathy Hinson that he had done something so bad that if the police ever found out he would go to prison for life, and that hunting men was more fun than hunting animals, was not extrinsic evidence on a "collateral" matter; rather, it was probative of Peckham's own guilt because, in light of the other evidence of motive and opportunity, the jury could have inferred from these statements that Peckham was alluding to the murder of Timmerman. Such evidence would have tended to inculpate Peckham as it exculpated the petitioner. *See Chambers,* 410 U.S. at 296-98.

The Court finds that the state courts' exclusion of the evidence under the circumstances amounted to an unreasonable application of clearly established federal law as determined by the Supreme Court. If this constitutional violation is not harmless, the petitioner is entitled to relief. *See Lewis v. Wilkinson,* 307 F.3d 413, 422 (6th Cir. 2002). "The test for harmless error, for purposes of determining habeas corpus relief, is whether the error made at trial 'had a substantial and injurious effect or influence in determining the jury's verdict, rather than whether the error was harmless beyond a reasonable doubt.'" *Ibid.* (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993)). "This standard of review requires the reviewing court to examine the effect of the error on the jury rather than the sufficiency of the evidence at trial." *Calvert v. Wilson,* 288 F.3d 823, 833 (6th Cir. 2002).

This Court has little trouble concluding that the improperly excluded evidence would have substantially influenced the jury's verdict. The failure to allow the jury to consider relevant and highly probative evidence of the guilt of a third party, who also happened to be the prosecution's main witness establishing the petitioner's motive, undermines confidence in the outcome of the case and rendered the trial fundamentally unfair.

There were no eyewitnesses to the shooting. The circumstantial evidence against the petitioner, although adequate, was nonetheless equivocal. The prosecution posited that the petitioner was upset that Philip Timmerman would not renegotiate his option to purchase property coveted by the petitioner, a theory supported by Peckham's testimony. But this theory was contradicted by the testimony of Judy Wynne that she had renegotiated the lease with Timmerman in 1992 and had given her children the first option to purchase the property.

Moreover, the prosecution's theory of how the petitioner actually went about committing the murder was weakened by other evidence in this case. Although the evidence established that the petitioner's house was only 1.53 miles from the victim's house, because the prosecution claimed that a footprint found by the railroad grade near 28th Street was made by the boot belatedly discovered inside the duffel bag that turned up in the petitioner's house, coupled with evidence of the route that the tracking dog followed, the petitioner would have had to hike

2.7 miles on foot from his home through woods and fields and along an abandoned railroad grade at night, lay in wait long enough for the grass to have matted down, kill Timmerman, and then return to his home. However, there was testimony that the petitioner's girlfriend, Norma Kawka, left the petitioner at his house at 10:00 p.m. on the night of the murder, and Judy Wynne testified that the petitioner took a shower at his house at 10:30 p.m. that night. Kawka said that she spoke with the petitioner by telephone at 10:50 p.m. Although the circumstances do not render impossible the prosecution's theory, there is certainly room to doubt the state's theory and consider an alternative that would involve a different killer.

Stephen Stein, Sr. testified that he observed another man walking away from the crime scene in a suspicious manner at the time of the murder. Stein's testimony was bolstered by the testimony of Christina and Mark Andrew Haveman, who observed the tail lights from a car or truck near the railroad grade from 28th Street in the direction of the murder scene at about the time that Timmerman was shot. In addition, there was evidence in the record that Peckham had the opportunity to obtain the petitioner's pistol, which was the likely murder weapon, and other evidence that connected Peckham to the clothing and other artifacts that later turned up in the duffle at the petitioner's house. The excluded evidence of Peckham's method of seeking revenge, his theft of women's underwear that associated him with the camisole discovered with the duffle, and his

cryptic admissions to Kathy Hinson, may well have furnished the missing links in the chain of evidence that would connect him to the killing and exonerate the petitioner.

The state courts' unreasonable application of clearly established federal law has resulted in the denial of the petitioner's federal constitutional right to present a defense and requires the issuance of the writ of habeas corpus.

B.

The reaction of the police to the mid-trial discovery of the duffle full of evidence provides the basis for other claims of the petitioner. The prosecutor apparently discounted immediately the suggestion that the evidence was planted by Mark Peckham, and instead a detective announced that he suspected defense counsel and some of the defendant's witnesses of tampering with the evidence in order to influence the jury, and threatened to charge them as accessories to murder. The petitioner contends that the State thereby created a conflict of interest depriving him of his Sixth Amendment right to the effective assistance of counsel, and impermissibly intimidated witnesses in violation of the Due Process Clause.

Defense trial counsel testified at the motion for new trial hearing that his client's mother and sister immediately turned over the evidence to him after it was discovered. Defense counsel offered to give the evidence to the prosecutor that same night, but when

the offer was refused he gave the evidence to the court the following day. It was then that defense counsel and the witnesses were accused and threatened. Defense counsel responded with a motion to dismiss, which was denied. He testified that he was intimidated by the threat of prosecution, and he believed the threats were a continuation of the prosecution's pretrial effort to disqualify him from representing the petitioner. Nonetheless, defense counsel permitted the detective to interview the defense investigator about the discovery and he submitted to an interview himself. The detective also interviewed the petitioner's mother and sister. These witnesses also submitted hair samples and fingerprints, as did defense counsel, since several hairs and latent prints were discovered in the duffle.

The state court of appeals determined that the threats by the police towards the petitioner's witnesses were harmless, because they did not prevent the witnesses from testifying. That court also rejected the petitioner's claim of ineffective assistance of counsel, observing that defense counsel never withdrew from the case as a result of the threats, so there was no evidence that the police threats impacted counsel's ability to represent the petitioner effectively. *People v. Wynne,* 1999 WL 33328893 at *1-2.

1.

The view of the state court of appeals that defense counsel actually would have had to withdraw

from the case to establish a constitutional violation of the petitioner's rights was not correct. Nevertheless, after canvassing the Supreme Court's cases on the subject, this Court does not find that an abridgment of the petitioner's right to counsel occurred.

As a general rule, to make out a claim of ineffective assistance of counsel under the Sixth Amendment, a petitioner must prove that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and that counsel's deficient performance prejudiced the petitioner, by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland v. Washington,* 466 U.S. 668, 687, 689 (1984). However, in cases where "the process loses its character as a confrontation between adversaries," the prejudice inquiry is truncated. *United States v. Cronic,* 466 U.S. 648, 656-57 (1984). Those circumstances include cases in which there is a complete denial of counsel, where there is an utter failure by counsel to subject the prosecution's case to meaningful adversarial testing, and "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Bell v. Cone,* 535 U.S. 685, 695-96 (2002). They also include cases in which counsel is laboring under an actual conflict of interest. *See Cuyler v. Sullivan,* 446 U.S. 335, 349-50 (1980). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his

representation need not demonstrate prejudice in order to obtain relief." *Ibid.*

The presumption of prejudice employed in cases of conflict of interest, however, is not quite as strict as in the three categories identified by the Court in *Bell.* As the Supreme Court explained in *Strickland*:

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan,* 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, *see, e.g.,* Fed. R. Crim. Pro. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v.*

> *Sullivan, supra,* 446 U.S., at 350 (footnote omitted).

Strickland, 466 U.S. at 691-92.

A variant of this rule occurs when the trial court is informed of a conflict, as in the case of multiple representation, and fails to make a timely and appropriate inquiry. *See Holloway v. Arkansas,* 435 U.S. 475, 484-91 (1978). In all other such cases, however, the petitioner must show that his lawyer's performance was hampered by an actual conflict of interest, which "may be demonstrated by pointing to 'specific instances in the record' that indicate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.'" *Riggs v. United States,* 209 F.3d 828, 831-32 (6th Cir. 2000) (quoting *Thomas v. Foltz,* 818 F.2d 476, 481 (6th Cir.), *cert. denied,* 484 U.S. 870 (1987)).

In this case, the conflict urged by the petitioner is not between the interests of two clients represented by one attorney, but between the petitioner and his attorney's own self-interest in avoiding criminal prosecution for tampering with evidence. Such a circumstance indeed raises a grave *potential* conflict of interest. However, in order for prejudice to presumed, the petitioner must show that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland,* 466 U.S. at 692 (quoting

Cuyler, 446 U.S. at 350). The record here does not demonstrate that trial counsel's performance was compromised. Although defense trial counsel testified at the motion for new trial hearing that he felt "intimidated" by the state's threats, there is no indication that those threats dampened the vigor of his advocacy for the petitioner. He fully cooperated with the police in the examination of the duffle and its contents so that a link to Mark Peckham might be discovered. He submitted to an interview and gave fingerprint and hair samples, and encouraged defense witnesses to do so as well. It is true that the State's enthusiasm in pursuing these leads was minimal. For instance, the state apparently did not conduct DNA testing on hair found inside of the duffel bag, or test the fingerprints found on the face paint mirror that was found inside of the bag. *See* Tr. of Mot. for New Trial, vol. I at 59. Such testing could have established that a third party handled the bag and "planted" it at the home to incriminate the petitioner. However, poor police work cannot be attributed to the defendant's trial lawyer. Moreover, since relief is granted on the first claim, if the State chooses to retry the petitioner, this important evidence, which surely the State has preserved, can now be tested and the results made available.

To be sure, an actual conflict of interest arises where "an attorney engages in wrongful conduct related to the charge for which the client is on trial." *United States v. Fulton,* 5 F.3d 605, 609 (2d Cir. 1993). However, defense counsel in this case denied

that he had tampered with the evidence, and there is no evidence in the record that contradicts that denial. This present case more closely parallels the circumstances in *United States v. Wallace,* 276 F.3d 360, 367-68 (7th Cir.), *cert. denied,* 536 U.S. 924 (2002), where the court found that defense counsel's performance was not ineffective based upon an actual conflict of interest when, although the government alleged that defense counsel engaged in witness tampering with the defendant, the defendant presented no evidence that defense counsel engaged in such conduct, he submitted an affidavit denying that witness tampering occurred, and the defendant presented no evidence that defense counsel's alleged conflict of interest caused an adverse impact.

Because there is no evidence of an actual conflict of interest on the part of the petitioner's trial counsel, the Court will not grant habeas relief on the basis of the petitioner's contention that his Sixth Amendment right to counsel was abridged by the State's threats of prosecution made against defense trial counsel in connection with the discovery of the duffle in the petitioner's home.

2.

This Court agrees with the state court of appeals that the police threats against the petitioner's witnesses to prosecute them did not result in a constitutional violation. Prosecutorial actions aimed at discouraging defense witnesses from testifying on a

defendant's may behalf deprive a defendant of his right to due process. *United States v. Pierce,* 62 F.3d 818, 832 (6th Cir. 1995) (citing *Webb v. Texas,* 409 U.S. 95 (1972)). However, even where a defendant can prove prosecutorial misconduct that amounts to substantial interference with a witness, such misconduct will not require a new trial if it is harmless. *United States v. Foster,* 128 F.3d 949, 953 (6th Cir. 1997), *cert. denied,* ___ U.S. ___, 123 S. Ct. 1320 (2003) (citing *Bank of Nova Scotia v. United States,* 487 U.S. 250, 255-256 (1988)). A defendant who claims that he was denied due process of law through government intimidation of defense witnesses must establish, as a "threshold matter," that the actions of the government "worked to deprive him of a witness who would have testified on his behalf." *United States v. Stewart,* 820 F.2d 370, 375 (11th Cir. 1987).

In the present case, the record discloses no such deprivation because all of the witnesses whom the petitioner sought appeared in court and testified on his behalf. In light of the fact that the State's threats of prosecution did not dissuade the petitioner's witnesses from testifying, this Court concludes that those threats were harmless with respect to the petitioner's witnesses, and there was no violation of the Due Process Clause that ought to be redressed by habeas corpus.

C.

The petitioner contends that the prosecution withheld exculpatory evidence from the defense that suggested that another person was the perpetrator. Alternatively, the petitioner alleges that his trial attorney was ineffective for failing to discover and present this evidence at trial.

As mentioned above, at trial, Stephen Stein, Sr. testified that he saw a strange man fleeing from the direction of the murder scene only minutes after the murder. Stein had testified that it was unusual for someone to be walking on a rural road at that late hour of the evening. Stein also testified that he had seen a white pickup truck in the area at the time of the murder. Mark Andrew Haveman and his wife Christina also testified that they saw taillights from a car or truck by the railroad grade near the victim's farm at the time of the shooting. All of this evidence suggested that someone else may have been the actual perpetrator of this murder.

The petitioner now claims that several members of Stephen Stein, Sr.'s family also saw this stranger walking away from the crime scene at the time of the murder, and that they were harassed and intimidated up until the time of the petitioner's trial, possibly by the actual perpetrator of the murder. The petitioner contends that the police and prosecutor were aware of this evidence but withheld it from defense trial counsel.

A year after the petitioner's trial, the petitioner's appellate attorney learned that Stephen Stein, Sr.'s wife, children, and nephew had seen a stranger come out of the bushes near the murder scene on the night of the murder. In addition, Steve Stein, Jr. had seen a white pickup truck allegedly "casing" the railroad grade when Philip Timmerman was planting on the afternoon of the shooting, and observed this same truck go down the grade the night before the shooting. Deborah Stein, Stephen, Sr.'s wife, believed that this truck also returned to their home several times after the killing to frighten and intimidate them, which ultimately caused the Steins to move out of fear of retaliation. The petitioner's post-trial motion to preserve the testimony of these witnesses by deposition was granted. Soon after the witnesses were deposed, the Steins' former home burned to the ground. All of these depositions were later admitted, pursuant to a stipulation between the parties, at the petitioner's motion for a new trial.

Stephanie Stein testified that on the night of the murder, she saw an ambulance and fire truck go by her house and went to the crime scene wither [sic] her brother Steve and her cousin Ricky Stein. She remained about five minutes at the crime scene before returning home. While returning, she saw a tall, skinny man come out of some bushes near a ditch close to the railroad grade that intersected the road, stand for a minute, and walk down the road toward her father. A few minutes later, she heard her father call for her brother and saw a pickup truck

stop on the road and heard the driver of the truck question her brother. Stephanie Stein acknowledged that defense investigator Patrick Parr had been to the Stein home to interview her father, but she did not tell Parr what she had seen because she did not want to get involved and she did not realize that this might be connected to Philip Timmerman's murder. Stephanie was interviewed by Detective O'Reilly, but only about Parr's interview with her father and not what she had actually observed. Stephanie Stein also stated that her family began to be harassed shortly after the murder by late night phone calls and visits by a white pickup truck with a noisy muffler. Stephanie testified that this harassment stopped immediately after the trial, but began about ten days before her deposition was taken.

Steve Stein, Jr. testified that around sunset on the night of the murder, he saw a white pickup truck with "glass pack" mufflers driven by a man who was not the petitioner go by their house very slowly and then up the railroad grade toward the murder scene. Later than night, he ran toward the scene with his sister and cousin. On the way home, a pickup truck stopped, and the driver asked Steve Stein, Jr. what had happened. The driver also spoke with Stein's mother. However, Steve Stein, Jr. was not sure if this pickup truck was the same one that he had seen on the railroad grade, although both were white Fords. Steve further believed, although he was not positive, that the white truck that stopped him on the road was the same one that returned when his family was

harassed after the murder and until the trial was over. In addition to the late night visits by this truck, Steve stated that his family received numerous hangup phone calls, and there was also an incident in which the Steins's trash container was taken to the murder scene and left where Timmerman had been shot. The harassment started up again before the depositions took place. Steve Stein, Jr. indicated that he was subpoenaed by the prosecutor but was not called at trial. Steve was not home when Detective O'Reilly came to speak to his family, so no statement was ever taken from him. Steve, Jr. did make a statement to defense investigator Parr before the terrorizing had occurred, and he did not tell Parr what his sister had seen.

Ricky Stein testified that he never spoke with the police or the defense before trial. He observed a white Ford truck on the day of the murder driving slowly by his house and park on the railroad grade near the murder scene around 6:00 p.m. Later that evening, he heard gunshots and went to the scene with his cousins to find out what had happened. On the way home, Ricky Stein saw a tall, skinny man walk past his Uncle Stephen near the railroad grade.

Deborah Stein, Stephen, Sr.'s wife, testified that she heard an ambulance go by her house on May 18, 1995 as she was unloading laundry. Her children and nephew went to the crime scene. A few minutes later, she went to retrieve her children and nephew. On the way home, a white Ford pickup stopped in the middle of the road and the driver began to persistently ask

her questions about what she had seen, exactly how long she was at the scene, and how many police were there. The driver also wanted to know who her children were and where they lived.

Deborah Stein and her husband spoke with defense investigator Parr several days after the murder, and she told Parr what she had seen on the night of the murder, but did not tell him about the harassment because it had not yet begun to occur. Detective O'Reilly only came to interview her family about two weeks before the petitioner's trial, but was only interested in how Parr conducted his interview. Deborah Stein testified that she and her family were reluctant to get involved in this case because of the ongoing harassment and because Detective O'Reilly assured her that the petitioner was guilty. Deborah Stein reiterated the testimony of the other Stein family members concerning the types of harassment that the family suffered from after the murder. Although not positive, Deborah Stein believed that the white truck that stopped her on the road on the night of the murder was the same one connected with the harassment, but she was more certain that the truck that was involved in the harassment of her family was the same one that she and her son had seen on the railroad grade earlier on the day of the murder. When Deborah Stein spoke with Detective O'Reilly, she informed him about the harassment, but claimed that he did not want to hear about it. According to Deborah Stein, O'Reilly suggested that the Steins get a trace on their telephone, for which she

signed a consent form. Stein also testified that they called the police after several of these incidents.

Stephen Stein, Sr. was also deposed. Stein testified that he had seen both red and white pickup trucks parked near the railroad grade on the day of the murder. He also described how his family had been harassed after the murder and stated that his wife told Detective O'Reilly about these incidents, but that O'Reilly said nothing. Although Stephen, Sr. told O'Reilly about the stranger that he had seen on the night of the murder, he stated that O'Reilly did not appear interested, indicated that the petitioner was guilty, and wrote nothing down.

At the hearing on the motion for a new trial, the petitioner's trial counsel testified that he was unaware that Steve Stein, Jr. had seen a white pickup truck go down the railroad grade in the direction of the barn at 9:00 p.m., just prior to the murder, but indicated that had he known that, he would have tried harder to subpoena him for trial. Trial counsel was also unaware that Stephen Stein, Sr. had observed white and red pickup trucks sitting on the road watching Philip Timmerman farm his fields around 3:00 p.m. on the day of the murder. The attorney was unaware that any of the other Stein family members had seen this strange man come out of the bushes on the night of the murder, but would have investigated it and used it at trial had he known. Trial counsel testified that he was never informed by the police or prosecutor about Detective O'Reilly's interview with Stephen and Deborah Stein,

in which they told him about being terrorized subsequent to the murder, and never received police reports about those incidents, but indicated that he would have introduced this evidence at trial had he known.

The well-established rule of *Brady v. Maryland,* 373 U.S. 83, 87 (1963), states that suppression by the State of evidence favorable to the accused violates the Due Process Clause where the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. The *Brady* rule is violated when (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it may impeach important inculpatory evidence; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. *See Strickler v. Greene,* 527 U.S. 263, 281-282 (1999). To establish a *Brady* violation, then, an accused person must show that the prosecution suppressed evidence, that such evidence was favorable to the accused, and that the evidence was material. *See Carter v. Bell,* 218 F.3d 581, 601 (6th Cir. 2000). A *Brady* violation is grounds for setting aside a conviction or a sentence in a habeas proceeding only if the failure to disclose the evidence "undermines confidence in the verdict because there is a reasonable possibility that there would have been a different result had the evidence been disclosed." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied.* Stated differently, the writ will not issue on the basis of an alleged *Brady* violation unless the undisclosed evidence creates a

reasonable probability that a different result would have occurred. *Coleman v. Mitchell,* 244 F.3d 533, 541 (6th Cir. 2001), *cert. denied,* 535 U.S. 1031 (2002) (quoting *Strickler,* 527 U.S. at 281). In this case, the petitioner's representatives had access to the Stein family members; they were not concealed or "suppressed" by the State. Defense counsel sent one of his investigators to interview them. There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source. *Coe,* 161 F.3d at 344. The *Brady* rule does not assist a defendant who is aware of essential facts that would allow him or her to take advantage of exculpatory evidence. *Coleman v. Mitchell,* 268 F.3d 417, 438 (6th Cir. 2001).

Moreover, the suppression of evidence that is cumulative of other evidence that the jury considered will generally not undermine confidence in the verdict. *See United States v. Bencs,* 28 F.3d 555, 560-561 (6th Cir. 1994), *cert. denied,* 513 U.S. 1117 (1995). Here, evidence that a suspicious person was seen fleeing the crime scene at the time of the murder was presented at the petitioner's trial through the testimony of Stephen Stein, Sr. If previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs unless the defendant is prejudiced by its nondisclosure. *United States v. Word,* 806 F.2d 658, 665 (6th Cir. 1986). In the present case, the jury was told that Stephen Stein, Sr. had observed a suspicious

individual fleeing the crime scene at the time of the murder. In addition, the Havemans testified that they had observed a vehicle parked by the railroad grade at the time of the killing. Because this information was presented to the jury, there was no *Brady* violation. *See Norris v. Schotten,* 146 F.3d 314, 334 (6th Cir. 1998). Since testimony from the other Stein family members concerning their encounter with a strange man near the crime scene would have been cumulative of Stephen Stein Sr.'s testimony, no *Brady* violation occurred. *See Spence v. Johnson,* 80 F.3d 989, 995 (5th Cir. 1996). Therefore, the petitioner is not entitled to habeas relief on his *Brady* claim.

The petitioner's ineffective assistance of counsel claim based on the failure to present this evidence also fails for a similar reason. As previously noted, the petitioner must establish that his attorney's constitutionally deficient performance caused his prejudice. *Strickland,* 466 U.S. at 687. Since the evidence that went "undiscovered" by the petitioner's trial counsel was cumulative, any failure attributable to defense counsel to discover and produce it did not run afoul of the Sixth Amendment as interpreted by *Strickland*.

D.

The petitioner next claims that he is entitled to habeas relief because his convictions result from evidence obtained during the course of a search and seizure that violated the Fourth Amendment. The

petitioner contends that the affidavit that was used to procure the warrant to search his house contained material misstatements, and that the evidence seized thereby should have been suppressed. Federal courts will not address a Fourth Amendment claim in a habeas proceeding if the petitioner had a full and fair opportunity to litigate the claim in state court and the presentation of the claim was not thwarted by any failure of the state's corrective processes. *Stone v. Powell,* 428 U.S. 465, 494-95 (1976). The court performs two distinct inquiries when determining whether a petitioner may raise a claim of illegal search and seizure in a habeas action. First, the "court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Machacek v. Hofbauer,* 213 F.3d 947, 952 (6th Cir. 2000) (quoting *Riley v. Gray,* 674 F.2d 522 (6th Cir. 1982)).

The petitioner here does not allege that the state court failed to hold a hearing on his Fourth Amendment claim. In fact, an evidentiary hearing was held on this very issue. Rather, the petitioner contends that he was denied a full and fair opportunity to litigate his Fourth Amendment claim because the state courts failed to make the correct factual determination when they ruled that the affidavit contained sufficient information to allow the magistrate to find probable cause to issue the search warrant.

There is no merit to this argument. Although a federal habeas court may inquire into the adequacy and fairness of the available state court procedures that were used to adjudicate a habeas petitioner's Fourth Amendment claim, "its inquiry ordinarily ends upon a determination that those procedures pass muster." *Sanna v. Dipaolo,* 265 F.3d 1, 8-9 (1st Cir. 2001). As long as a state prisoner has had an opportunity to litigate his Fourth Amendment claims by means of procedures that are "suitably crafted" to test for possible Fourth Amendment violations, a federal habeas court does not have the power, under *Stone,* to "second-guess the accuracy of the state courts' resolution of those claims." *Id.* Thus, a "mistaken outcome" of a suppression hearing that has been conducted in a state trial court, standing alone, does not deny a habeas petitioner's opportunity to fully and fairly litigate his Fourth Amendment claims. *Id.* at 9. The relevant inquiry is whether a habeas petitioner had an opportunity to litigate his claims, not whether he in fact did so or even whether the Fourth Amendment claim was correctly decided. *Ortiz-Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996). Thus, even "potentially meritorious Fourth Amendment claims" are barred by *Stone* on habeas review if the petitioner had a full and fair opportunity to litigate his claims in the state courts. *Deputy v. Taylor,* 19 F.3d 1485, 1491 (3d Cir. 1994), *cert. denied,* 512 U.S. 1230 (1994).

E.

Finally, the petitioner contends that the trial court failed to provide a proper instruction defining the concept of reasonable doubt. The trial court gave the standard Michigan jury instruction on reasonable doubt, which states:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not an imaginary or possible doubt but a doubt based on reason and common sense. A reasonable doubt is just that. A doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Mich. Cr. Jury Inst. 2d § 3.2.

This Court previously has criticized Michigan's standard instruction on the subject because it "conveys very little information to jurors as to the constituencies of reasonable doubt, which is the key component of the state's burden of proof. Rather, it directs the jury to the nature of the evidence, tells them to use their common sense, and then, in a grand display of circularity, 'explains' that a 'reasonable doubt' is '"[a] doubt that is reasonable."'" *Poremba v. Bock,* No. 99-10450-BC, 2003 WL 102632, at *12 (E.D. Mich. 2003). However, the Sixth Circuit has held that this instruction does not violate the Due Process Clause, as the petitioner has acknowledged. *See Binder v. Stegall,* 198 F.3d 177 (6th Cir. 1999).

The petitioner attempts to distinguish *Binder* by contending in this case that the prosecutor "denigrated" the reasonable doubt standard by stating in his closing argument that a "reasonable doubt is something this [sic] is very nebulous that you have to decide what a reasonable doubt it [sic], the Judge will instruct you on it." Trial Tr. XII at 166. The Michigan Court of Appeals rejected this claim, finding that the trial court's instruction on reasonable doubt was proper and that the petitioner had failed to request a modified instruction on reasonable doubt, thus precluding relief on this claim. *People v. Wynne,* 1999 WL 33328893, at * 5.

The Court finds that the petitioner's jury instruction claim was denied by the state appellate court because he did not follow the correct procedure to preserve the claim. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, *Coleman,* 501 U.S. at 750, if he fails

to present an issue to a state appellate court at his only opportunity to do so, *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. *United States v. Frady,* 456 U.S. 152, 167-69 (1982); *Simpson v. Sparkman,* 94 F.3d 199, 202 (6th Cir. 1996).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. *Williams v. Coyle,* 260 F.3d 684, 693 (6th Cir. 2001), *cert. denied* 536 U.S. 974 (2002); *Warner v. United States,* 975 F.2d 1207, 1213-14 (6th Cir. 1992), *cert. denied,* 507 U.S. 932 (1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman,* 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." *Simpson,* 94 F.3d at 202. Whether the independent state ground is adequate to support the

judgment is itself a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

Here, the state court of appeals relied on a state statute that required the petitioner to request a jury instruction in the trial court in order to assign instructional error on appeal. *See* Mich. Comp. L. § 768.29. The statute plainly states that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." The Court finds that the state court of appeals' reliance on this procedural default constitutes an adequate and independent state ground to deny relief. Since the petitioner demonstrated neither cause nor prejudice, habeas relief on this ground will be denied.

III.

Because the Court finds the petitioner's trial was unfair due to the violations of the Sixth Amendment and the Due Process Clause explained earlier, the Court concludes that the petitioner is in state custody in violation of the United States Constitution as a result of a state court decision "that . . . involved an unreasonable application of [] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

Accordingly, it is **ORDERED** that the petition for writ of habeas corpus is **GRANTED**.

It is further **ORDERED** that the respondent shall release the petitioner from custody unless the State brings him to trial again within ninety days.

/s/
DAVID M. LAWSON
United States District Judge

Dated: September 2, 2003

Copies sent to: John R. Minock, Esquire
Bethany L. Scheib, Esquire

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SCOTT MONTGOMERY WYNNE, Defendant-Appellant.	UNPUBLISHED December 3, 1999 No. 192512 Allegan Circuit Court LC No. 95-009788 FC

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in failing to grant a new trial based on newly discovered evidence of res gestae witnesses. We disagree. Defendant's characterization of the evidence as newly discovered is erroneous. Because the information was available prior to trial, it cannot be classified as

newly discovered.[1] *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971). In any event, the testimony would not have aided in developing a full disclosure of the facts surrounding the commission of the murder. Accordingly, the Steins were not res gestae witnesses. *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985).

Defendant next argues that he was denied the right to impeach prosecution witness, Mark Peckham, and demonstrate that Peckham had committed the murder. We disagree. Defendant offered evidence in the form of testimony of other "witnesses" concerning various things Peckham had said or done in the past. Testimony regarding Peckham's past violence and criminal acts, offered to prove that he acted in conformity therewith, constituted improper impeachment under MRE 404(b). Testimony regarding his sexual proclivities was inadmissible because it was unrelated to truthfulness. *People v Chaplin*, 412 Mich 219, 225-226; 313 NW2d 899 (1981). Testimony offered to contradict Peckham's testimony was inadmissible because a proper foundation for impeachment did not occur, *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987) and it constituted impeachment by extrinsic evidence on a collateral matter. *People v Sutherland*, 149 Mich App 161,

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[1] In fact, one of the alleged res gestae witnesses testified at trial, and testimony of other family members was cumulative to this testimony. Furthermore, another alleged witness was subpoenaed to testify at trial, but was not called.

165-166; 385 NW2d 637 (1985). Testimony regarding Peckham's history of mental illness was inadmissible because defendant failed to establish that the information was temporally relevant, that is, that any mental illness was suffered by Peckham and affected his memory, ability to perceive reality, or tell the truth. *United States v Jackson*, 863 F Supp 1462, 1465 (D Kan, 1994).

Defendant next argues that the trial court erred in failing to dismiss the charges due to the intimidation of defense counsel and defense witnesses. We disagree. During trial, new evidence was located by defense investigators under suspicious circumstances and turned over to defendant's counsel. A police officer suspected that the evidence had been planted and threatened to charge one defense investigator and defendant's family members. The threat of a police officer is attributable to the prosecution. *People v Hooper*, 157 Mich App 669, 675; 403 NW2d 605 (1987). However, because the threat did not dissuade the witnesses from testifying and there is no evidence that it caused them to withhold testimony that they otherwise would have offered, we find that any error was harmless. *United States v Foster*, 128 F3d 949, 953 (CA 6, 1995); *United States v Pierce*, 62 F3d 818, 832-833 (CA 6, 1995). Defendant also challenges intimidation of his trial counsel by threats from the prosecution. Because defense counsel did not withdraw from the case and there is no evidence that the threat of prosecution actually affected his ability to represent defendant effectively, defendant was not

prejudiced or deprived of his right to counsel. *United States v Amlani*, 111 F3d 705, 710-711 (CA 9, 1997). The trial court was not required to disqualify defense counsel because there was no evidence that he was involved in any criminal activities and no evidence thereof either was or would have been disclosed to the jury. *United States v Garrett*, 727 F2d 1003, 1007-1008 (CA 11, 1984). The trial court did not err in denying defendant's motion to dismiss.

Defendant next argues that the prosecution violated *People v Nash*, 418 Mich 196, 228; 341 NW2d 439 (1983), which prohibits disclosure to the jury that the police received evidence from defendant's attorney. We disagree. Review of the record reveals that the prosecutor did not *elicit* such evidence from the witnesses. One witness volunteered that the evidence had been in defense counsel's possession in response to another question. The prosecutor, however, is not responsible for voluntary, nonresponsive answers to questions, and admission of the answer by the witness does not constitute error. *People v Williams*, 114 Mich App 186, 198-199; 318 NW2d 671 (1982).

Defendant next argues that the trial court improperly excluded evidence regarding neighbor Randy Bellingar's involvement with drugs. We disagree. Defendant sought to show that Bellingar used, possessed, or grew marijuana in order to show that he might have killed the victim. The few established facts disclosed by the record fail to support that conclusion, which could only be reached by piling inference upon inference based on evidence that was

speculative at best. *People v Wilson*, 107 Mich App 470, 474; 309 NW2d 584 (1981). Bellingar's involvement with drugs did not make it more probable that he killed the victim, *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), especially where as here, there was no evidence to link Bellingar to the murder weapon, which was owned by defendant and found in his home.

Defendant also sought to introduce evidence of Bellingar's involvement with drugs to impeach the testimony of his wife and stepson. The evidence was not admissible as impeachment evidence because it related to a collateral matter, *Sutherland, supra*, and it did not support the inferences necessary to draw a conclusion that the witnesses' testimony was untruthful. We find no abuse of discretion in the exclusion of the evidence surrounding Bellingar. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997).[2]

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[2] Defendant also contends that newly discovered evidence reveals that Bellingar had marijuana at his home at the time of the murder. In the voluminous exhibits submitted by defendant, the statement of William Christman, IV, was submitted. Therein, Christman stated that he observed marijuana in a freezer behind the Bellingar house, however, he failed to identify when this viewing incident occurred. Christman also stated that Bellingar's stepdaughter had a party one and a half weeks to two weeks before the murder. At that time, Bellingar's stepdaughter gave Christman marijuana, however, he did not see the location from which the drugs were taken. He merely assumed that it was from the same location because it looked the same. Additional statements about roach clips and growing of marijuana were hearsay, *People v Bartlett*, 231 Mich App 139,

(Continued on following page)

Defendant next argues that the trial court erred in admitting other acts evidence at trial. We disagree. Evidence of other crimes is not admissible to prove the character of a person to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material. MRE 404(b)(1). If the other acts evidence is offered "to prove some fact other than character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). The other acts evidence, that defendant had vandalized the victim's farm equipment, was offered as part of a logical progression of events demonstrating that defendant had a motive to harm the victim. Although motive is not an element of the crime, it was relevant to show that defendant was the one person known to harbor animosity toward the victim, thus making it more

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159; 585 NW2d 341 (1998), and based on Christman's assumptions that the marijuana was grown because it was "not worth buying." Defendant's contention, that this statement established that marijuana was present at the Bellingar residence at the time of the murder, is without merit. Furthermore, defendant's contention, that the victim was "seen" with drug officials following the raid on his farm, failed to establish that the victim was "involved" with officials such that any vandalism to his property could be construed as retaliation.

likely that he was, in fact, the person who committed the crime and was not "framed" by someone else as he claimed. The evidence, although prejudicial, was not unfairly so because the prior acts were dissimilar to the crime charged, *Crawford, supra*, and the court properly instructed the jury on the limited use of the evidence. We find no abuse of discretion. *Id.*

Defendant next argues that the trial court erred in refusing to allow defense expert, David Balash, to testify regarding ballistic evidence. We disagree. The trial court did not abuse its discretion in refusing to qualify Balash as an expert in the area of determining entry and exit wounds in bodies when he had not examined the victim. The trial court did not require that Balash satisfy an overly narrow test of qualifications, rather, defendant failed to lay a foundation to show that he was qualified to make such an assessment from the coroner's report. *People v Haywood*, 209 Mich App 217, 225; 530 NW2d 497 (1995). Furthermore, the trial court did not abuse its discretion in admitting the bullets recovered from the victim's body into evidence or in denying defendant's motion for a new trial due to a break in the chain of custody. The testimony of the prosecution witnesses established to a reasonable degree of certainty that the bullets did come from the victim's body. Any deficiency in the chain of custody went to the weight of the evidence, not its admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). Defendant's claim that the admission of the evidence denied him an opportunity to call another medical examiner

regarding proper chain of custody procedures has not been preserved for appeal, defendant having failed to make an offer of proof at trial. MRE 103(a)(1). To the extent defendant sought to have the witness criticize the techniques of the medical examiner who performed the autopsy, the testimony would not have been admissible. *People v Brownridge*, 459 Mich 456, 460 n 4; 591 NW2d 26 (1999). We find no abuse of discretion.

Defendant next argues that the trial court abused its discretion in admitting photographs into evidence. We disagree. The photographs were admissible to prove intent and to corroborate the medical examiner's testimony. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). There was no abuse of discretion in the admission of the photographs. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

Defendant next argues that the prosecutor wrongfully withheld, or the trial court erred in denying his motion for discovery of, a police officer's personnel file, which ostensibly contained evidence that the officer was under investigation for wrongdoing. We disagree. Because the officer's misconduct was unrelated to this case, did not involve falsifying evidence, and had not yet resulted in the filing of criminal charges, it was not material to a determination of guilt or punishment and thus the prosecutor was not required to produce it. *United States v Agurs*, 427 US 97, 112; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10

L Ed 2d 215 (1963); *People v Brownridge (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 183507, issued 8/17/99), slip op at 2. Because the officer did not have charges pending against him and the incident of misconduct was unrelated to veracity, evidence of the misconduct was not admissible for impeachment purposes, MRE 608(b), MRE 609, and thus the court did not abuse its discretion in denying the motion. *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997).

Defendant next argues that the trial court erred in denying his motion to dismiss for failure to preserve evidence regarding fingerprints and residue testing. We disagree. The failure to preserve evidence that may have exonerated the defendant does not constitute a denial of due process unless the defendant shows that the police acted in bad faith. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Because defendant has made no such showing, defendant was not denied a fair trial. *Id.* Furthermore, we note that residue testing would not have exonerated defendant because it was his theory that the gun was used by someone else to kill the victim, then returned to defendant's home in order to "frame" him for the murder. Residue tests would have demonstrated that the gun had recently been fired, but not who fired it.

Defendant next asserts that the trial court erred in denying his motion to suppress evidence on the basis that the search warrant affidavit contained false statements. To prevail on a motion to suppress

evidence pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally or with reckless disregard for the truth inserted false material into the affidavit or made a material omission and that the false material or material omission was necessary to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995); *People v Kort*, 162 Mich App 680, 686; 413 NW2d 83 (1987).

The affidavit did not contain any material omissions. It did contain one false statement regarding information that the affiant received from other officers, but there was no evidence to show that the affiant knew or had reason to believe at the time that the information was false or that the officers who provided it knew or had reason to believe it was false. Therefore, the trial court's finding that the statement was an innocent mistake is not clearly erroneous. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Defendant also contends that the court should have suppressed the search warrant because the allegations failed to establish probable cause. When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). Paying deference to the magistrate's determination that probable cause did exist,

this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *Id.*

The affidavit indicated that defendant lived near the place where the victim was killed, that defendant was upset with the victim over a land transaction, that he had previously been investigated in connection with the vandalism to the victim's farming equipment, and that defendant owned the same type of weapon that had been used to shoot the victim. These facts and circumstances provide a substantial basis for the magistrate's determination of probable cause. Therefore, the trial court properly denied defendant's motion to suppress.

Defendant next argues that he is entitled to a new trial based on ineffective assistance of counsel. This issue is not properly before this Court because defendant simply alleges, without briefing, certain claims, *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992), and fails to cite any authority in support of the claims that are briefed. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, the claims concerning trial counsel's performance are related to the principal errors raised on appeal which, as noted above, do not warrant relief. Defendant has failed to show that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant next argues that the trial court erred in denying his motion to permit the jury to view the scene. We disagree. The trial court did not abuse its discretion in denying the motion given that photographs and diagrams of the scene were admitted into evidence, there was no dispute as to their accuracy, and the court found that viewing the scene would not have aided the jury in deciding any facts at issue. *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981).

Lastly, defendant argues that the trial court erred in failing to provide a proper instruction regarding reasonable doubt. We disagree. The trial court's instruction on reasonable doubt was proper. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). Defendant's failure to request a modified instruction on reasonable doubt precludes relief. MCL 768.29; MSA 28.1052. Defendant did not request, nor was he entitled to, an instruction similar to CJI 4:2:02. *People v Marsack*, 231 Mich App 364, 380; 586 NW2d 234 (1998). Defendant's claim that the trial court did not give a cautionary instruction on other acts evidence is belied by the record. We find no error requiring reversal.[3]

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[3] Defendant failed to brief his claim that he is entitled to a new trial based on prosecutorial misconduct and has therefore abandoned the issue. *Kent, supra*.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

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618 N.W.2d 595

463 Mich. 876

Supreme Court of Michigan

People

v.

Scott Montgomery Wynne

NO. 116612. COA No. 192512.
September 26, 2000

Disposition: Delayed application for leave to appeal from the December 3, 1999 decision of the Court of Appeals is DENIED.

Nos. 03-2319/09-1148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT WYNNE, Petitioner-Appellee,	)	
v.	)	ORDER
PAUL RENICO, Respondent-Appellant.	)	(Filed Aug. 3, 2010

BEFORE: MARTIN and SUTTON, Circuit Judges; and REEVES,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

185 (2)

Supreme Court, U.S.
FILED
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No. 10-865

In the Supreme Court of the United States

SCOTT WYNNE, PETITIONER

v.

PAUL RENICO, WARDEN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's reasoning in *Harrington* v. *Richter*, 130 Ct. 770 (2011) make clear that a State appellate court in habeas corpus—consistent with *Early* v. *Packer*, 537 U.S. 3 (2002)—that a State court adjudication is entitled to deference where that court provides no analysis on the constitutional grounds but only on state evidentiary grounds in rejecting the Petitioner's claim of error?

2. Does Petitioner present a conflict in the federal circuits on the constitutional right to present a defense where the only federal circuits that have ruled that Fed. R. Evid. 404(b) should be construed to apply to criminal defendants alone did so on evidentiary grounds, rather than constitutional grounds?

3. Does Petitioner provide a good vehicle to address the legal issue raised in his petition in this factually intricate case where any error was harmless and the propensity evidence excluded by the State trial court was of limited probative value and Petitioner was able to challenge the credibility of the prosecution's witness at issue?

PARTIES TO THE PROCEEDING

Petitioner is Scott Wynne, who was convicted in a Michigan court of two counts of first-degree felony murder, two counts of armed robbery, and one count of conspiracy to commit armed robbery. Respondent Paul Renico was the warden of the prison where Petitioner was serving his sentence.[1]

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[1] Petitioner's current warden is Carol Howes. < http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=247226 > and < http://www.michigan.gov/corrections/1,1607,7-119-1381_1388-5371--,00.html > (last accessed March 30, 2011).

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OPINIONS BELOW

On December 3, 1999, the Michigan Court of Appeals affirmed Petitioner's convictions of first-degree premeditated murder. Pet. App. 108-120. On September 26, 2000, the Michigan Supreme Court denied Petitioner's application for leave. Pet. App. 121.

Petitioner timely filed a petition for a writ of habeas corpus. In 2003, the district court granted habeas relief on Petitioner's first claim—the constitutional right to present a defense. Pet. App. 45-106. In 2004, the Sixth Circuit issued an order remanding the matter to the district court to address the "factual discrepancies." In 2009, the district court issued a supplemental order, again granting habeas relief. Pet. App. 18-43. The district court found the factual mistakes in Petitioner's original brief to be "serious," but in the end that it did not change the district court's initial analysis. Pet. App. 42.

The United States Court of Appeals for the Sixth Circuit reversed the district court's grant of habeas relief in a published opinion. Pet. App. 1-17.

JURISDICTION

The State of Michigan agrees that Petitioner timely filed a petition for certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in Petitioner's petition. Pet. 2. The State has laid out the other relevant provisions in the appendix to this brief. 1a-2a.

INTRODUCTION

Petitioner's claim that there is a conflict between the federal circuits on this issue is not supported by the cases. Rather, the few federal circuits that have examined this issue *on constitutional grounds* have either supported the decision here or otherwise reserved the question whether there could be a circumstance in which there could be evidence that is inadmissible under Fed. R. Evid. 404(b) but must be included based on a criminal defendant's constitutional right to present a defense. The only court that arguably conflicts with the decision here is the Connecticut Supreme Court in 2010, but this does not reflect either an established or mature conflict.

Even if there were a mature conflict, it would be precisely the fact that a circuit split exists that would bar the issue's consideration in this proceeding. That is because this is a habeas corpus case, subject to the Anti-Terrorism and Death Penalty Act (AEDPA). The fact that the State court did not expressly engage in a constitutional analysis did not deprive the decision of deference under *Early* v. *Packer*, 537 U.S. 503 (2002). Likewise, based on this Court's recent decision in *Harrington* v. *Richter*, 130 S. Ct. 770 (2011), the State court decision here would be subject to habeas deference. In the same way that a summary order on the merits is entitled to deference in *Harrington*, so the decision of the Michigan courts here is entitled to deference where it rejected the merits of Petitioner's claim of error, even though the adjudication provides no analysis on the constitutional grounds but examines it on State evidentiary grounds alone.

Under AEDPA, a petitioner is not entitled to relief unless he can demonstrate that his conviction resulted from the contrary to or an unreasonable application of clearly established Supreme Court precedent. Petitioner has asked this Court to settle what it claims is a circuit conflict; by definition then, there is no clearly established federal law that could form the basis of AEDPA relief. As a result, the petition should be denied.

Moreover, this petition does not merit this Court's review for other additional reasons.

This is a poor vehicle to review this claim because any error was harmless in light of the strong evidence of Petitioner's guilt, so that any decision here would not result in a reversal of Petitioner's conviction.

This is also a poor vehicle to review the claim because the factual arguments advanced here are intricate and controverted. There was significant other non-propensity evidence that was introduced to impeach one of the prosecution witnesses, and the propensity evidence that Petitioner sought to introduce was of limited probative value. Petitioner's right to present a defense was not compromised regardless of the standard applied here.

This Court should deny certiorari.

STATEMENT OF THE CASE

Following a jury trial in a Michigan court, Petitioner Scott Wynne was convicted in Allegan County Circuit Court of first-degree premeditated murder. This habeas corpus case started as a rural Michigan land dispute. Petitioner murdered Philip Timmerman because Petitioner believed that Timmerman had swindled Petitioner's mother into granting a long-term lease to a part of the Wynne family homestead.

Because this first-degree premeditated murder case involves a right-to-present-a-defense claim, the petition is framed by (1) the prosecution evidence; (2) what theories and evidence Petitioner was able to present; and (3) the pure propensity evidence regarding a third-party witness that was excluded on evidentiary grounds.

The Sixth Circuit's opinion, authored by Judge Sutton, described the facts produced at the State trial against Petitioner:

> On May 18, 1995, Timmerman was shot to death while working on his farm. No eyewitnesses to the shooting emerged, but several pieces of physical evidence linked [Petitioner] to the crime. Ballistics evidence identified [Petitioners'] .45 caliber pistol as the murder weapon. [Petitioner's] fingerprint appeared on the weapon's ammunition magazine. And footprints at the crime scene matched boots found in [Petitioner's] house. [Petitioner] also had a motive. Three days after the shooting, [Petitioner's] friend Mark

> Peckham contacted the police, telling them that he had heard [Petitioner] say he wanted to kill Timmerman on several occasions, apparently because he thought Timmerman's long-term lease on the Wynne family farm would terminate upon Timmerman's death. [Petitioner] was so frustrated about his land dispute with Timmerman, Peckham said, that he spoke with Peckham ten to thirty times about murdering Timmerman, sometimes in conversations that turned into detailed descriptions of how he would carry out the crime. [Pet. App. 2-3.]

At his State trial, Petitioner was able to present non-propensity evidence to probe Peckham's credibility and to suggest that that Peckham may have framed Petitioner. The Sixth Circuit summarized the defense theory and corresponding evidence:

> As part of his defense, [Petitioner] alleged that Peckham had killed Timmerman. The trial court allowed [Petitioner] to introduce the following evidence to support this theory: Peckham wanted to frame him to retaliate for various wrongs, including [Petitioner's] purported firing Peckham five months before the murder; Peckham acknowledged he had fired some of [Petitioner's] guns in the past and knew where [Petitioner] kept most of his guns, including the .45 caliber murder weapon; Peckham told an investigator he was "really pissed" at [Petitioner] because [Petitioner] "had everything given to him and never returned anything to [his] family," and

> Peckham's insurance agent testified that Peckham had told him at least three or four times in the week after [Petitioner's] arrest that Peckham was "going to put [Petitioner] away[.]" [Pet. App. 8 (citations omitted).]

Petitioner attempted to present at trial pure propensity evidence against Mark Peckham, a prosecution witness. The Sixth Circuit detailed the extraneous propensity evidence—in a list of five times—that the State trial court would not allow Petitioner to present:

> The trial court, however, drew the line at evidence directed only to Peckham's bad character. [1] The court excluded testimony by Peckham's former girlfriend that, eight years before the murder when she was in middle school, he had threatened to cut off the fingers of a classmate who touched her breasts. [2] It excluded her testimony that several years earlier, Peckham had abused her and threatened to kill her and that Peckham's trailer mysteriously burned down within hours of their break-up. [3] It excluded testimony that, after a failed suicide attempt five years earlier, Peckham declined psychologically, becoming "passive aggressive" and intent on exacting revenge in secretive ways. [4] And it excluded evidence of Peckham's alleged admission to a co-worker several months before the murder that he had "done something so bad in his past that if the police ever found out about it he would go to prison for life."

> [5] The trial court also excluded evidence about Peckham's apparent interest in women's underwear. At some point during the trial, [Petitioner's] investigator discovered a blue bag in [Petitioner's] house, which contained a boot with tread that matched the footprints found at the crime scene. The defense did not mention until several days after delivering the bag to the court that it found a black camisole near the bag. With this evidence, the defense sought to link Peckham to the bag via his apparent underwear fascination, but the court would not allow it. [Pet. App. 4 (citations omitted; bracketed numbers inserted).]

REASONS FOR DENYING THE PETITION

Based on the standards established by this Court in *Early*, 537 U.S. at 503, and confirmed by *Harrington*, 130 S. Ct. at 770, the merits decision by the Michigan Court of Appeals rejecting Petitioner's claim of error is entitled to deference under AEDPA. Thus, this case is a poor vehicle in which to examine the legal issue here because even if there were a circuit split, there would be no clearly established law from this Court on the issue.

And the claim that there is a federal circuit split is overstated in any event. For the cases cited by Petitioner, they either have examined the issue on evidentiary grounds alone, did not rule on the issue, or ruled consistent with the decision here. The only possible split relates to a decision from the Connecticut Supreme Court. There is no mature or established conflict requiring this Court's review.

Moreover, with the powerful facts produced at trial, any error was harmless.

And the facts here are intricate, are controverted, and the propensity evidence excluded was of limited value. Given the evidence that the State trial court admitted, Petitioner was not deprived of his right to present a defense. Garden-variety evidentiary rulings—like placing a limitation on the admission of propensity evidence—do not necessarily implicate constitutional protections that require this Court to mandate the mechanics of these rulings, thereby invading the province of state courts.

I. The issue whether the State court decision was entitled to deference under AEDPA is a threshold issue, which would eliminate the need to review any possible circuit conflict.

Petitioner raises two claims in asking this Court to grant certiorari. Petitioner argues that the decision here conflicts with this Court's prior decisions, Pet. 15-17, and that there is a circuit split on this issue, Pet. 18-24. Neither provides a basis on which to review this petition.

A. The Sixth Circuit's decision does not conflict with any decision of this Court.

There is no decision of this Court that has reviewed this issue. This Court has not reviewed the question whether a criminal defendant has a right to introduce propensity evidence against a third party in support of the claim that such a person is the "real" killer—where that evidence would not otherwise be admissible under the rules of evidence, 404(b).

The cases cited by Petitioner from this Court do not answer this claim. Pet. 15-17. Rather, these cases address the right to present a complete defense in other factual circumstances—not as in the issue presented here. For example, in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), this Court examined the propriety of excluding evidence of the circumstances in which the police obtained a confession from the defendant. *Id.* at 691. That is a significantly different issue than the one here. The fact that a court may not constitutionally exclude evidence about the voluntariness of a confession does not resolve the issue whether a court may exclude propensity evidence when introduced

against a third party (non-defendant). The decision below does not conflict with this Court's prior decisions.

B. This Court's decisions in *Early* and *Harrington* make clear that the decision here was entitled to AEDPA deference.

This Court in *Early* made clear that a State court decision that resolves the merits of a claim is entitled to deference even if it does not cite any constitutional standards:

> A state-court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Avoiding these pitfalls does not require citation of our cases—indeed, *it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.* [*Early*, 537 U.S. at 8 (emphasis added).]

Although the Sixth Circuit reviewed the matter de novo, Pet. App. 5 ("give fresh review"), the adjudication was entitled to deference.

This legal point was confirmed in January 2011, after the Sixth Circuit decision here and after Petitioner filed the present petition. This Court issued its decision in *Harrington* concluding that a summary order—without reasoning—that disposes of a

Petitioner's claim is entitled to habeas deference. Like *Early*, that same reasoning applies here.

In *Harrington*, the order at issue was a "one-sentence summary order" that did not include "an accompanying statement of reasons" for the decision. Slip. op. 2, 6. This Court then held the decision *itself*, rather than the reasoning underlying the decision, receives the deference from the AEDPA statute:

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated. [Slip. op. 8-9.]

The Court further explained that it is "presumed" that the state court adjudicated the claim on the merits "in the absence of any indication or state-law procedural principles to the contrary." Slip. op. 9.

Here, Petitioner's claim of error—that the evidence that Peckham was the real killer was wrongfully excluded—was addressed by the Michigan Court of Appeals on the merits. The reasoning of the Michigan court evaluated the claim on State evidentiary grounds alone and did not expressly address the claim on constitutional grounds:

> Defendant next argues that he was denied the right to impeach prosecution witness, Mark

> Peckham, and demonstrate that Peckham had committed the murder. *We disagree.* Defendant offered evidence in the form of testimony of other "witnesses" concerning various things Peckham had said or done in the past. Testimony regarding Peckham's past violence and criminal acts, offered to prove that he acted in conformity therewith, constituted improper impeachment under Mich. R. Evid. 404(b). Testimony regarding his sexual proclivities was inadmissible because it was unrelated to truthfulness. [Pet. App. 109 (emphasis added).]

The reasoning of this Court's decisions in *Early* and *Harrington* apply to the adjudication of the decision here. The fact that the Michigan Court of Appeals did not provide express analysis on the constitutional underpinning of the claim of error does not mean that the Court was not adjudicating this basis for the claim. This is particularly true where—as here—the State evidentiary analysis is related to, and intertwined with, the proper constitutional analysis.[2]

Under Michigan law, evidence inadmissible under Mich. R. Evid. 404(b) is excluded because character evidence is unreliable and not strongly probative. See, e.g., *People* v. *Crawford*, 458 Mich. 376, 393; 582 N.W.2d 785, 794 (1998)("The other probative danger underpinning the character evidence prohibition is the risk that the jurors will overestimate the probative

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[2] In support of this point, it is worth noting that the district court here concluded that the Michigan Court of Appeals did not "directly" address the question of the decision under the right to present a defense. Pet. App. 71.

value of character as a predictor of conduct."). And there can be no dispute that the right to present a defense must yield to ordinary evidentiary rules where the evidence sought to be admitted is unreliable. See *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998).

Even if the State accepts that there is a circuit split on this issue, if given habeas deference, the State court decision would not provide an opportunity for this Court to review the issue presented. Where there is a circuit split, this fact provides support for the conclusion that a state court adjudication is not unreasonable for reaching a decision that is consistent with one set of federal courts over another. See *Price* v. *Vincent*, 538 U.S. 634, 643 (2003)("This was not an objectively unreasonable application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find double jeopardy violations under similar circumstances.").

Significantly, all of the nine cases cited by Judge Martin in his dissent here to show a circuit split were direct review cases. Pet. App. 12 n.3. Seven of the cases are direct review arising from federal criminal convictions. *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir. 1987); *United States* v. *Blum*, 62 F.3d 63 (2nd Cir. 1984); *United States* v. *Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States* v. *Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States* v. *Sepulveda*, 710 F.2d 188 (5th Cir. 1983); *United States* v. *Lucas*, 357 F.3d 599 (6th Cir. 2004); *United States* v. *McCourt*, 925 F.2d 1229 (9th Cir. 1991); and *United States* v. *Morano*, 697 F.2d 923 (11th Cir. 1983). One case is a direct review from a state conviction. *State* v. *Hedge*, 1 A.3d 1051 (Conn. 2010).

And one case arises from a 42 U.S.C. § 1983 civil action. *Agushi* v. *Duerr*, 196 F.3d 754 (7th Cir. 1999).

There is no clearly established law on this point.

C. There is no established circuit split on whether such evidence is constitutionally required in any event.

On the reverse-404(b) evidence issue here, the Sixth Circuit premised its analysis on its previous decision in *Lucas*, 357 F.3d at 599. Pet. App. 7-8. In *Lucas*, the Sixth Circuit held that "the standard analysis for Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime." *Lucas*, 357 F.3d at 606. The Sixth Circuit then noted that the evidence there did not meet any of the rules exceptions, and alternatively, even if it had, the trial court's balancing of the probative value versus the prejudicial effect was not in error. *Lucas*, 357 F.3d at 606. The Sixth Circuit held that under this process "that Lucas was not prevented from presenting a complete defense." *Lucas*, 357 F.3d at 606.

It is against this analytical backdrop that Petitioner contends that there is a "profound split" of authorities on the constitutional right to present a defense. There are nine cases cited by Judge Martin, and relied on by the petition, Pet. 18-23, n.2 in support of the contention that there is a circuit split on this issue, but the cases from other jurisdictions do not support this conclusion.

Three of the circuit cases are not reverse-404(b) cases at all but were circumstances in which the

prosecution introduced the evidence. *Gonzalez-Sanchez*, 825 F.2d at 572 ("We find little merit in [defendant's] challenge to the evidence concerning his counseling of gang members in connection with the van thefts."); *Sepulveda*, 710 F.2d at 188 ("Defendant maintains that testimony relating to the heroin transaction was "extrinsic evidence" and should have been excluded under Fed. R. Evid. 404(b)"); and *Morano*, 697 F.2d at 923 ("[Defendant] claims that it was reversible error for the district court to allow evidence of [the witness's] prior arson convictions and testimony concerning his unusual method for starting fires."). Because the evidence was used by the prosecution against the defendant—not the defendant seeking to use to claim someone else committed the crime—it does not implicate a criminal defendant's right to present a defense.

Also, in determining that the Fed. R. Evid. 404(b) applies to third parties, the Seventh Circuit was examining this issue in a civil context in which a criminal defendant's constitutional right to present a defense was not implicated. *Agushi*, 196 F.3d at 761. This case does not support a claim of a circuit split.

Moreover, two of the circuits reviewed and determined that the evidence the criminal defendant sought was admissible under 404(b) as an evidentiary matter of federal law, rather than as required by the constitutional right to present a defense. See *Blum*, 62 F.3d at 63 ("As evidence directly relevant to showing motive it plainly was admissible under Fed. R. Evid. 404(b)."); and *Aboumoussallem*, 726 F.2d at 911-912 ("We disagree with the District Court to the extent it

excluded the proposed testimony as irrelevant or as inadmissible under Rule 404(b).").

In *Blum*, the Second Circuit evaluated the basis for the district court's exclusion of the evidence—Fed. R. Evid. 403 and 608(b)—and determined that the evidence was admissible under Fed. R. Evid. 404(b). The Second Circuit cited the constitutional right to present a defense but ultimately ruled on evidentiary grounds. *Blum*, 62 F.3d at 68-69. Similarly, in *Aboumoussallem*, another Second Circuit case, the analysis there was again based on evidentiary principles without an analysis under the constitutional right to present a defense. *Aboumoussallem*, 726 F.2d at 911-912. Although the Second Circuit noted that "we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword," the Second Circuit did not indicate that this standard was required by the Constitution. *Id.*

Thus, these are ultimately federal evidentiary rules—not rules required by the Constitution. The federal courts do not require the state courts to adopt their evidentiary construction of rules of evidence if not constitutionally required. See *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991)("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). As a consequence, these two cases do not provide a basis on which to contend that there is a split on whether propensity evidence is required by the constitutional right to present a defense.

Finally, the two federal circuits that reviewed this matter on constitutional grounds addressed the issue whether a criminal defendant may escape the obligations of Fed. R. Evid. 404(b) where it seeks to introduce propensity evidence to support a theory of innocence. See *Stevens*, 935 F.2d at 1380; *McCourt*, 925 F.2d at 1229.

In *Stevens*, the Third Circuit concluded that "a defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations." *Stevens*, 935 F.2d at 1405. Although not a clear expression of the right to present a defense, the Third Circuit tied its analysis to the "general belief that a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test." *Stevens*, 935 F.2d at 1406.

But the Third Circuit later clarified this standard in *United States* v. *Williams*, 458 F.3d 312 (3rd Cir. 2006). Although framed as an evidentiary analysis, the Court did recognize the potential for right-to-present-a-defense implications. *Williams*, 458 F.3d at 317 n.5. In *Williams*, the Third Circuit "clari[fied]" that "Rule 404(b)'s proscription against propensity evidence applies regardless of by whom, and against whom, it is offered." *Williams*, 458 F.3d at 314. The court in *Williams* further stated that *Stevens* recognized that defendants have more leeway to present evidence under 404(b) when it relates to one of the rule's exceptions, but not for pure propensity purposes. *Williams*, 458 F.3d at 314. The Third Circuit expressly reserved the constitutional question, noting that

"[u]nder exceptional circumstances, therefore, it could plausibly be argued that a defendant has a constitutional right to present propensity evidence otherwise barred by Rule 404(b)," but that the particular case did not require the resolution of that issue. *Id.* at 314 n.5. The Third Circuit's opinion in *Williams* is substantially in line with the Sixth Circuit's analysis in *Lucas* and the case here.

Similarly, the Ninth Circuit in *McCourt* determined that the proscriptions in 404(b) are not limited to an accused. *McCourt*, 925 F.2d at 1232. The court then concluded that the trial court had not erred in disallowing the evidence where 404(b) prohibits propensity evidence, regardless of who offers it, although it may be admissible for "other relevant purposes." *McCourt*, 925 F.2d at 1235-1236. The court concluded that the ruling did not impair the right to present a defense because he was able to present evidence "the jury could have inferred that [the third party] was the more likely culprit." *McCourt*, 925 F.2d at 1236 n.12. The Ninth Circuit's conclusions in *McCourt* are substantially consistent with *Lucas* and the case here.

If there is a conflict, it arguably relates to the Connecticut's Supreme Court decision in *Hedge*, 297 Conn. 621 (2010). In addressing the admissibility of reverse-404(b)-style evidence, the Connecticut Supreme Court concluded that the evidence had to meet one of the Connecticut rule's exceptions, and then, the probative value had to outweigh the prejudicial effect. The court ultimately concluded that the constitutional right to present a defense required the admission of the evidence because "the trial court's

exclusion of the defendant's third party culpability evidence violated the defendant's right to present a defense." *Hedge*, 297 Conn. at 654.

Any conflict here has not matured and does not merit action by this Court at this time. There is no established conflict between the federal circuits on the issue as a constitutional matter.

II. This case is a poor vehicle for addressing this issue because the extraneous propensity evidence relating to Peckham, if error, was harmless.

The evidence against Petitioner was very strong and was comprised of three separate items: (1) Petitioner had a clear motive in light of a running family land dispute and Petitioner had mentioned killing Timmerman on several occasions; (2) ballistics evidence identified Petitioner's .45 caliber pistol as the murder weapon and Petitioner's fingerprint appeared on the weapon's ammunition magazine; and (3) footprints at the crime scene matched boots found at Petitioner's home.

Fairly viewed, the record shows that even if the State trial court somehow erred in excluding the additional evidence regarding Peckham, the error did not have a substantial and injurious effect or influence in determining the jury's verdict.

This Court held in *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Reversal of a conviction on habeas review is allowed only if the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631.

A. The trial evidence demonstrated that Petitioner had a motive to murder the victim.

Petitioner's mother, Judy Wynne, testified that around 1980 she and her husband, Edwin, had leased land to the Timmermans and that this was a verbal agreement, not written. R 12, IX 137-138. The land surrounded their home and was known as the "West 80" and the "East 80." In 1989, Judy Wynne sold the West 80 and leased a portion of the East 80 to the Timmermans. Both transactions were reduced to writing. R 12, IX 139-140.

Judy Wynne then testified that in September of 1992, there was a second lease drawn up that included an option for her children to purchase the land. The new lease was signed with victim, Philip Timmerman, in 1993, effective in January 1994, and gave her children a 5-year option to buy the land from her. Mrs. Wynne conceded that the amended lease nevertheless included a 30-year lease for the Timmermans and that she did not entirely understand that part of it when she signed the lease. R 12, IX 145.

Judy Wynne testified that a couple of years after Petitioner returned from Florida, in approximately 1991, he became aware of the 1989 lease and was "extremely mad" at her for that. R 12, IX 146-147. She tried to eliminate the 30-year lease portion of the agreement, but Philip Timmerman would not agree to that. R 12, IX 148. Most importantly, Judy Wynne testified that she had spoken to the victim about purchasing back his interest in the land a few months prior to the murder during February or March 1995. She told Timmerman that she had heard rumors that

he may want to sell the property, but Timmerman said that he wanted to retain it. R 12, IX 151-153. Later in the trial, Mrs. Wynne testified Timmerman refused her offer to buy back the land during the 1995 meeting. R 12, X 29-30.

Many witnesses were unaware of the crux of the dispute: Timmerman had *possession* of the land and Petitioner wanted it back. Mark Peckham had discussions with Petitioner about the property dispute. R 12, VI 65. Petitioner also told John Brokus, a business associate, that he was upset at his mother for giving up the land without talking to him. R 12, VII 162. Petitioner also told Ben Koteras that he had seen a lawyer about trying to get out of the lease. R 12, VII 190. He told Norma Kawka the same thing. R 12, IX 44. Petitioner complained to Elizabeth Carns about the land dispute and told her of his anger towards Timmerman. R 12, VII 196-200.

Just a few days prior to the murder, Petitioner told Mark Pentacost about the land dispute with the victim, that it was upsetting, and how he hoped his attorney would work it out. R 12, IX 221-222. Petitioner also expressed his frustrations to Robert Clark. R 12, V 270-271. Ben Koteras testified that even hours before the murder, Petitioner told him that he had just had "words" with the victim. R 12, VII 191-192. Even Petitioner admitted that he was upset over the sale of his family's property to Timmerman when he was questioned by police after the murder. R 12, III 220-221; R 12, IV 13.

Accordingly, the motive for this murder was Petitioner's escalating quarrel with Timmerman that stemmed from Timmerman's refusal to release his

long-term interest to land that Petitioner felt should, by right, have stayed with his family. The quarrel progressed from angry words to felonious acts of vandalism. R 12, XII 156.

B. The physical evidence linked Petitioner to the murder.

After working a long day in his fields, the victim was shot to death while he was working near a piece of farm equipment between 10:22 and 10:37 p.m. on May 18, 1995. R 12, V 220, R 12, VII 121. He was shot nine times: eight times with .45 caliber bullets, and once with a .22 caliber bullet. R 12, II 182-183. Two farm hands were working with the victim planting corn on the night of the murder. One farm hand, Brent DeWeerdt, called the other farm hand, Keith Kohtz, on a tractor radio after hearing the shots and finding Timmerman lying on the ground. R 12, II 76-84. Kohtz testified that it was 10:38 p.m. by the clock in his tractor when DeWeerdt radioed him. R 12, II 141. When Kohtz reached the scene he called 911 from a cellular phone, R 12, II 141-147, which was placed at 10:42 p.m. R 12, II 76-78, 143, 162-66, 164.

The distance from the scene of the crime to Petitioner's residence was 1.53 miles. R 12, III 23. Two sets of footprints were found in the field at the homicide scene leading towards a nearby abandoned railroad grade, and a police dog tracked a human scent along one path to the side of a field where an area of the grass was matted down. R 12, III 57-62. A cast of a footprint found at the crime scene believed to be the perpetrator's was made. R 12, III 172. Shell casings and a spent .45 caliber cartridge buried in the ground

under where the victim was lying were also taken into evidence. R 12, III 177-178, 185, 189.

Later the next day, a .45 caliber Ruger semi-automatic pistol was found by Allegan County Sheriff David Haverdink hidden above the tiles in the ceiling of Petitioner's bedroom. R 12, III 191, 214-217, IV 166-167. A firearms expert testified that the bullets recovered from the victim's body as well as the casings and bullet found at the scene matched the pistol discovered in Petitioner's room and no other gun. R 12, IV 187-204. A latent fingerprint examiner also testified that a latent print was discovered on an ammunition magazine found in the holster for the pistol came from Petitioner and no other person. R 12, V 180-181.

Petitioner was brought in for questioning the day after the shooting. Petitioner contends that Petitioner's gun was only recovered because Petitioner insisted that police search for it a second time at his house after they failed to discover it during a first search. Pet. 8. The record indicates otherwise. Detective O'Reilly, Sheriff Haverdink, and several deputies arrived at the Wynne residence with a search warrant the day after the murder. R 12, III 210-211. O'Reilly made contact with Petitioner outside the residence at about 7:45 p.m. R 12, III 214. O'Reilly took him into custody and transported him back to the Sheriff's Department for an interview. R 12, III 215-217. During the interview, Petitioner informed O'Reilly that he routinely kept a .45 handgun on his bedpost. R 12, III 222-223. After O'Reilly's officers failed to locate the .45 on the bed-post, it was Detective Haverdink who decided to initiate a more thorough search of the house. R 12, IV 146-150. Haverdink testified that he was the one who

decided "let's look one more time, be sure we look in every area." R 12, IV 147. He was also the one who decided to check above the ceiling tiles. R 12, IV 148-149. The gun was *not* recovered because Petitioner insisted that police keep searching for it; it was located because a thorough search was conducted.

Over one week into the trial, Petitioner's trial counsel revealed that his investigators had discovered a canvas duffel bag in Petitioner's residence which contained several items. R 12, VI 3-9. The bag contained: a military belt, canteen, knife, tear gas canister, leather gloves, socks, hat, articles of camouflage clothing, loose ammunition, and a camouflage face painting kit. R 12, IX 18-24. A latent fingerprint found on the tear gas canister was identified as belonging to Petitioner. R 12, IX 85-93. An expert in footprint and trace evidence testified that the boots found in the duffel bag matched the cast of the impression taken at the scene. R 12, IX 111. Petitioner's mother identified the boots found in the duffel bag as similar to the type Petitioner wore. R 12, IX 187. Petitioner's sister identified a camouflage shirt found in the duffel bag as her military issue clothing, and she acknowledged that she had previously given Petitioner several pairs of her camouflage clothing. R 12, IX 130-131.

C. There was strong circumstantial evidence that implicated Petitioner.

Apart from the fact that the victim was killed with Petitioner's gun which was found hidden in his room, and that boots discovered in Petitioner's house were worn by the perpetrator, other strong circumstantial evidence proved that Petitioner committed the crime.

First, there was evidence presented indicating that Petitioner on previous occasions had vandalized the victim's property. Peckham testified that Petitioner had slashed tires on the victim's tractors on previous occasions. R 12, VI 67-70, 81. Peckham also testified about the times Petitioner expressed a desire to kill the victim. Petitioner described different ways he could kill Timmerman, including doing so in a field while the victim was farming. R 12, VI 75-80. Petitioner's admissions to the vandalism was not confined to Peckham's testimony. His account was corroborated by Petitioner's former girlfriend, Elizabeth Carns. She testified that Petitioner admitted to her that he had slashed the victim's tractor tires. R 12, VII 200. Ken Timmerman, the victim's brother, described the tire slashing incident. R 12, VII 218, V 40, VII 95-100.

Second, evidence also indicated that Petitioner and the victim had words on the day of the murder, and that Petitioner was angry that evening as a result. On the evening of the murder, Ben Koteras stopped by to visit Petitioner. R 12, VII 178. When he arrived Petitioner was target practicing with his pistol in the yard. Koteras mentioned to Petitioner that on his way over he had seen the victim in his field. Petitioner responded that he knew that and that he had had "words" with the victim earlier that day. To Koteras, it appeared that Petitioner was target shooting with a .22. R 12, VII 188. The .22 used in the murder was never recovered.

In sum, the case presented against Petitioner was strong: he was engaged in a land dispute with the victim that had already escalated to acts of felonious vandalism, he had made statements about planning to

murder the victim, he was seen target shooting hours before the murder after just having "words" with the victim, the victim was shot dead with Petitioner's gun which was found hidden in his bedroom, and boots found hidden in the house were identified as having been worn at the crime scene.

III. This case is also a poor vehicle for addressing the issue raised in the petition because it is a fact-bound inquiry.

A. Petitioner was not denied his constitutional right to present a defense—the State trial court gave Petitioner wide latitude in exploring Peckham's motives.

The right to present a defense has long been recognized as a "fundamental element of due process." *Washington* v. *State*, 388 U.S. 14, 19 (1967). Nevertheless, "[a] defendant's right to present evidence is not unlimited, but rather is subject to reasonable restrictions." *Scheffer*, at 523 U.S. 308; *Crane*, 476 U.S. at 690. A defendant's interest in presenting evidence may "bow to accommodate other legitimate interests in the criminal trial process." *Scheffer*, 523 U.S. at 308; *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). There is no unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence; the exclusion of evidence does not violate the Due Process Clause unless it offends some fundamental principle of justice. See *Montana* v. *Egelhoff*, 518 U.S. 37, 42-43 (1996).

State and federal rule-makers generally have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials" and "[s]uch rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, quoting *Rock*, 483 U.S. at 56.

Here, the State court evidentiary ruling under Mich. R. Evid. 404(b) was neither arbitrary nor disproportionate. And it did not deprive Petitioner of his right to a defense.

The crux of Petitioner's claim is that he was denied a fair opportunity to present evidence to impeach prosecution witness Peckham and suggest that he committed the murder and framed Petitioner. In contrast, the State of Michigan contends that the State trial record shows that defense counsel was given a free hand in attacking Peckham's credibility, in suggesting that he had a motive to falsely accuse Petitioner, and in suggesting that he had a motive and opportunity to frame Petitioner for the murder.[3]

Peckham's jealousy and motive

During Petitioner's cross-examination of Peckham, defense counsel was freely allowed to delve into various lines of questioning both seeking to impeach Peckham and to suggest he had a motive and opportunity to commit the murder.

Defense counsel was allowed to suggest that Peckham was jealous of Petitioner's position in the Wynne family and to suggest that Peckham therefore had a motive to frame Petitioner. Peckham testified that the Wynne family was like a family to him as well.

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[3] Petitioner contends that the Sixth Circuit decision is based "upon a significant mistake of fact," Pet. 11, arguing that there was no evidence that Peckham wanted to frame Petitioner or that suggested that Peckham was the murderer. Petitioner merely disagrees with the Sixth Circuit's characterization of the record, but the State contends that Petitioner did suggest at trial that Peckham framed him.

R 12, VI 115. Peckham and Petitioner were very good friends in high school, and Peckham described himself as Petitioner's only friend. R 12, VI 119-120. Judy Wynne co-signed a loan for Peckham, and when Peckham filed for bankruptcy, Peckham had to pay her back. R 12, VI 118-119. Peckham acknowledged that Petitioner's business was successful, but he denied defense counsel's suggestion that he told anyone that Petitioner "gets more than he deserves." R 12, VI 136-127. Defense counsel also suggested, over Peckham's denial, that Peckham told someone that he felt bad for Judy Wynne because Petitioner took from the family without giving anything back. R 12, VI 127. Defense counsel also suggested that Peckham had ill feelings towards Petitioner after he left employment with him. R 12, VI 131-132. Peckham denied defense counsel's allegation that he told someone that Petitioner made too much money and that Peckham did not make enough. R 12, VI 132.

Defense counsel was allowed to establish a revenge motive for Peckham by eliciting facts as to when and under what circumstances Petitioner ended his working relationship with Peckham. Peckham testified that the working relationship with Petitioner ended in November or December of 1994. R 12, VI 103-104. Defense counsel elicited testimony that after he quit working for Petitioner, Peckham moved from job to job. R 12, VI 107-108. Peckham worked for Petitioner for 11 to 13 months, his longest term of employment. R 12, VI 122. Defense Counsel elicited from Peckham that Peckham believed Petitioner had his phone shut off. R 12, VI 133-134. Peckham testified that Petitioner was not returning his calls at about the time he stopped working for him. R 12, VI 136-137. Defense counsel

made the alternate suggestion that Peckham was angry with Petitioner for selling a house to Mark Haveman instead of Peckham. R 12, VI 211.

Thomas Cole was allowed to testify that Peckham was "pissed" at Petitioner and told him that "[Petitioner] had everything given to him and that he had not returned anything to his family." R 12, X 109. Mike Densham testified that Peckham told him "I'm going to put [Petitioner] away," three or four times after Petitioner had been arrested. R 12, X 202-203. Lastly, Petitioner himself was allowed to testify regarding an alleged motive for Peckham to frame Petitioner for the murder. R 12, XI, 144-146, 149, 152.

Defense counsel accused Peckham during Peckham's cross-examination of telling Mike Densham that he was going to put Petitioner away for the crime. R 12, VI 194.

Peckham's character

Defense counsel was also allowed to bring out the fact that Peckham told people that he is a passive-aggressive person, which Peckham described as: "a person who holds in their anger and basically their anger builds within themselves and they will act out one way or another." R 12, VI 112. Defense counsel was allowed to suggest that Peckham told Matt Radke that he would get someone back without the person knowing who did it. R 12, VI 112-113. When the prosecutor objected to this line of questioning, it was defense counsel that agreed to move on. R 12, VI 113. Defense counsel suggested by his examination that this case was an example of this personality trait, because if Peckham really knew that Petitioner planned to kill

the victim, he could have told the victim or the police. R 12, VI 177-178. He likewise questioned Peckham as to why he had not reported two instances of tire slashing. R 12, VI 183-184. Defense counsel suggested by his questioning that Peckham was collecting information about tractors Petitioner had vandalized for future use against Petitioner. R 12, VI 180-181.

Matt Radke and Melissa Hill were allowed to testify that Peckham had a reputation for dishonesty. R 12, IX 275; X 5. Peggy Liechti was allowed to testify about an incident occurring on March 9, 1995, where she saw Peckham emerge from Petitioner's office holding a rifle. R 12, X 77-79.

Defense counsel also accused Peckham of telling defense witness Hinson that Peckham had a secret for which he could go to jail for the rest of his life, and that hunting men was more fun than hunting animals. R 12, VI 194-195.

Peckham's "admissions"

Defense counsel was additionally permitted to suggest that Peckham inadvertently said the word "idiot," which was recorded at the end of the tape of his police interview, and that this showed that Peckham believed Detective O'Reilly was an idiot for believing Peckham's story. R 12, VI 99-101. Defense counsel then suggested that Peckham incorporated facts about the crime he could have not have known about during the police interview. Counsel suggested that Peckham claimed Petitioner did it all on foot because he learned from Norma Kawka that Petitioner's vehicles had not moved during the time of the crime. R 12, VI 153-154.

Defense counsel pointed out that Peckham failed to reveal to Detective O'Reilly that he had spoken with Petitioner on the evening of murder by phone, though an interview was conducted only two days later. R 12, VI 160-161. Defense counsel suggested that Peckham was lying about not knowing the details of the murder since Peckham picked 10:22 p.m. as the time he left for work. R 12, VI 163-164. Lastly, defense counsel suggested through his questioning that the phone call from Petitioner to Peckham between 10:00 and 10:12 p.m. on the night of the murder was meant to be an alibi for Peckham, and not for Petitioner. R 12, VI 185. Peckham was forced to admit that this phone call was not mentioned to Detective O'Reilly during their first interview. R 12, VI 185-186.

Peckham's opportunity to "frame" Petitioner

Significantly, defense counsel was allowed to combine this attack on Peckham's personality with a suggestion that Peckham knew about Petitioner's guns, where he kept them, and how to gain entry into the Wynne house. Peckham testified during cross examination that he had last been upstairs in the Wynne house a few weeks or months prior to trial. R 12, VI 117. Defense counsel suggested that Peckham knew which bedroom belonged to Petitioner, and that Peckham knew Petitioner kept his guns near his bed. R 12, VI 121, 187-188. Peckham testified that on occasion he shot guns with Petitioner while he was working for him, including a .45 hand gun, and .22 rifles. R 12, VI 129. Peckham admitted to seeing Petitioner keep some of his guns in a gun rack in the pole barn. R 12, VI 131. Peckham admitted also that he had the access code to Petitioner's pole barn. R 12, VI 141. Peckham testified

that in December of 1994, he gained access to the pole barn to retrieve his rifle. R 12, VI 142-143.

Defense counsel also suggested that Peckham knew how to break into the Wynne home. He suggested over Peckham's denial that Peckham saw Petitioner enter through the back door of his house by using a credit card to slip the lock. R 12, VI 144. Counsel also suggested over Peckham's denial that Peckham saw Wynne family members open the locked front door by hitting it with their hip. R 12, VI 144. Peckham also denied knowing about any hidden keys to Wynne house. R 12, VI 144-145.

Defense counsel suggested that Peckham may have secured Petitioner's gun two days before the murder. He elicited from Peckham that he was at Petitioner's shop two days before murder, which was located within 100 feet of his house. R 12, VI 188-189. Peckham testified that he had borrowed Petitioner's camouflage clothes the Sunday before the murder. R 12, VI 147-148. Defense counsel also was allowed to suggest that Peckham owned his own unregistered 9 mm hand gun. R 12, VI 114-115, 125. Counsel even elicited from Peckham that he would wear camouflage clothing if he were going to commit a murder. R 12, VI 174.

Apart from the cross-examination of Peckham himself, defense counsel also was allowed to attack Peckham during his cross-examination of other prosecution witnesses. Detective O'Reilly testified that Peckham contacted police and gave information indicating the possible involvement of Petitioner in the victim's murder. Through his cross examination, though, defense counsel suggested that Peckham was aware of specific evidence when he gave his statement

to O'Reilly. R 12, IV 77. Defense counsel also inquired whether O'Reilly questioned Peckham about his own whereabouts at the time of the murder. R 12, IV 85-87.

Finally, during the cross examination of Mark Haveman, defense counsel sought to suggest that Peckham had an opportunity to obtain Petitioner's gun two days prior to the murder. He elicited from Haveman that it was odd that Petitioner's garage door was open on the Tuesday before the murder when Haveman saw Peckham on Petitioner's property. R 12, VII 47.

In summary, there was substantial evidence that Petitioner was able to present in support of his claim that Peckham was not credible and may have framed Petitioner for this crime.

B. The excluded evidence was of marginal significance.

Turning now to the excluded evidence, the State trial court only limited Petitioner when he attempted to attack Peckham based on years-old prior bad acts or matters that were otherwise wholly irrelevant to demonstrate that Peckham was motivated to falsely accuse or frame Petitioner. Reviewing the list of five pieces of evidence at issue from the Sixth Circuit decision, Pet. App. 4 (see Res. Br. 6-7) demonstrates the limited probative value of the evidence.

The Sixth Circuit identified two categories of evidence.

The first category included the evidence of bad acts from many years or months remote from the crime, and

had no relationship to the crime. This included four items: (1) Peckham's threat to "cut off the fingers of a classmate" in middle school; (2) Peckham's alleged abuse of his girlfriend and threat to kill her that occurred several years before the murder; (3) Peckham's failed suicide attempt five years earlier, becoming passive aggressive, and his intent to exact revenge in secretive ways; and (4) his alleged admission several months before the crime that he "done something so bad in his past that" he could go to prison for life. None of this proposed evidence was significant and was also excludable under the simple rules of evidence under Mich. R. Evid. 403.

The second category related to the black camisole and the bag that was found at Petitioner's home during trial.

Missy Hill-Weeks testified at the proffer of evidence that she started dating Peckham in 1985 when she was twelve-years old and he was seventeen-years old, and they dated for four and one-half to five years, R 12, IX 296, and that Peckham stole women's underwear from an apartment complex that his brother managed, and therefore had pass-key access to, R 12, IX 298-300. The underwear incidents occurred seven years before the trial. R 12, IX 303.

Accordingly, the incidents between Hill-Weeks and Peckham concerned his immature and bad behavior with a juvenile girlfriend, occurring many years before the trial, and none of which had anything at all to do with the real-life execution style murder of a grown man. Petitioner makes much of Hill-Weeks proffer about Peckham stealing women's underwear and attempts to link it to the discovery of the mysterious

camisole found in Petitioner's house near a bag containing incriminating evidence. Pet. 13-14. The record shows, however, that this petty conduct occurred when Peckham was a teenager and happened to have pass-key access to apartments managed by his brother, and when Hill-Weeks was willing to sneak into her friend's bedrooms for him. R 12, IX 302, IV 17.

At the time of trial, however, Peckham was 26 years-old, married, and had a three-year old child. R 12, IV 17. There was no evidence that this particular conduct lasted for any substantial period of time or that it continued beyond his adolescence.

Following the Hill-Weeks proffer, Petitioner's trial counsel moved to admit the evidence regarding Peckham's adolescent panty-raids by linking it to the camisole, but the trial court denied the motion as follows:

> THE COURT: Well, if you had some evidence to show that Mr. Peckham, to use the term loosely, some evidence to show that Mr. Peckham somehow surreptitiously got that blue bag into the Wynne house I suppose potentially there might be some basis to allow that underwear evidence in, but even then we're talking about something that occurred seven or eight years ago. There's nothing to show that that exists at this time. It just seems to me that there's absolutely no foundation, no relevance, nothing other than to maybe show generally that Mr. Peckham's a dislikable person. I don't see how it shows a scheme whatsoever.

> Identity, as I said, *if there was something to link up with Mr. Peckham to that bag, and there isn't, or to this crime, at least at this point, speculation, guess and conjecture, innuendo, I see nothing that would—could serve as a foundation to show scheme.* I think it's a far cry that somebody apparently gathers ladies underwear unbeknownst to them while he's in their house or whatever, or has his girlfriend do it, I wasn't clear what Melissa said as to how he got it. But anyhow, I really just think that's so remote, so far into the past that it has absolutely no relevance or probative value here except as I stated before which is not a proper basis. [R 12, IX 308-310 (emphasis added).]

The State trial court's ruling was an ordinary, evidentiary ruling that does not implicate Petitioner's constitutional right to present a defense.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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Dated: April 2011

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Petitioner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The relevant State rule of evidence is Michigan Rules of Evidence 404, which provides:

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.